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CONTAINING A

# A DIGEST

OF

## THE REPORTED CASES

DETERMINED IN

THE DIVISIONS OF

# The Supreme Court of Judicature

FOR ONTARIO,

AND

The Supreme and Exchequer Courts of Canada,

CONTAINED IN VOLUMES

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WITH

A TABLE OF CASES AFFIRMED, REVERSED, OR SPECIALLY CONSIDERED.

Compiled by Order of the Law Society of Upper Canada,

BY

JAMES F. SMITH, Esq.,

AND

F. J. JOSEPH, Esq.,

ONE OF HER MAJESTY'S COUNSEL,

OF OSGOODE HALL, BARRISTER-AT-LAW.

TOGETHER WITH

## AN APPENDIX,

CONTAINING A DIGEST OF CASES REPORTED IN VOLS. 1, 2, AND 3 OF CARTWRIGHT'S  
CASES ON THE BRITISH NORTH AMERICA ACT, 1867,

BY

JOHN R. CARTWRIGHT, Esq.,

OF OSGOODE HALL, BARRISTER-AT-LAW.

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HON. JOHN

HON. JOHN

HON. JOHN

HON. GEORGE

HON. CHRIST

HON. JOSEPH

HON. FEATHER

(a) The Chief

CHIEF JUSTICES AND JUDGES  
OF THE  
SUPREME AND EXCHEQUER COURTS OF CANADA  
AND OF THE  
SUPREME COURT OF JUDICATURE FOR ONTARIO.

*Supreme and Exchequer Courts of Canada*

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HON. SIR WILLIAM JOHNSTONE RITCHIE,

KNT. .... Appointed 11th of January, 1879.

JUDGES.

HON. SAMUEL HENRY STRONG ..... Appointed 8th of October, 1875.

HON. TÉLÉSPHORE FOURNIER ..... " 8th of October, 1875.

HON. WILLIAM ALEXANDER HENRY .... " 8th of October, 1875.

HON. HENRI ELZÉAR TASCHEREAU .... " 7th of October, 1878.

HON. JOHN WELLINGTON GWYNNE .... " 14th of January, 1879.

*Supreme Court of Judicature for Ontario.*

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HON. JOHN GODFREY SPRAGGE ..... Appointed 2nd of May, 1881.

HON. JOHN HAWKINS HAGARTY ..... " 6th of May, 1884.

JUDGES.

HON. GEORGE WILLIAM BURTON ..... Appointed 30th of May, 1874.

HON. CHRISTOPHER SALMON PATTERSON " 6th of June, 1874.

HON. JOSEPH CURRAN MORRISON ..... " 30th of November, 1877.

HON. FEATHERSTON OSLER ..... " 17th of November, 1883.

(a) The Chief Justice of Appeal is styled "Chief Justice of Ontario."—44 Vict. c. 5, s. 4.

CHIEF JUSTICES AND JUDGES OF THE PROVINCE OF ONTARIO.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

CHIEF JUSTICES AND PRESIDENTS.

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HON. SIR ADAM WILSON, KNT. .... " 6th of May, 1884.

JUDGES.

HON. JOHN DOUGLAS ARMOUR ..... Appointed 30th of November, 1877.

HON. MATTHEW CROOKS CAMERON ..... " 15th of November, 1878.

HON. JOHN O'CONNOR ..... " 11th of September, 1884.

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HON. SIR MATTHEW CROOKS CAMERON, KNT. " 13th of May, 1884.

JUDGES.

HON. THOMAS GALT ..... Appointed 7th of June, 1869.

HON. FEATHERSTON OSLER ..... " 5th of March, 1879.

HON. JOHN EDWARD ROSE..... " 4th of December, 1883.

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JUDGES.

HON. WILLIAM PROUDFOOT..... Appointed 30th of May, 1874.

HON. THOMAS FERGUSON..... " 21th of May, 1881.

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MARITIME COURT.

JUDGES.

JOHN BOYD, ESQ. .... Appointed 28th of March, 1883.

JOSEPH EASTON McDUGALL, Esq., Q.C. " 17th of September 1885.

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- ROBERT GLADSTONE DALTON, Esq., Q.C. . . . . Appointed Clerk of the Crown and Pleas  
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February, 1870; appointed Master in  
Chambers, 23rd of August, 1881.
- THOMAS HODGINS, Esq., Q.C. . . . . Appointed Master in Ordinary of the Su-  
preme Court of Judicature for Ontario,  
10th of January, 1883.
- JOHN WINCHESTER, Esq. . . . . Appointed Registrar of the Queen's Bench  
Division 28th October, 1882, and  
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22nd of March, 1884.

## Ministers of Justice and Attorneys-General.

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- HON. JOHN DAVID SPARROW THOMPSON,  
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- HON. OLIVER MOWAT, Q.C. . . . . Appointed 31st of October, 1872.

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### Supreme Court of Judicature for Ontario

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ALEXANDER GRANT ..... Appointed 11th February, 1882.

## THE HIGH COURT OF JUSTICE.

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#### COMMON PLEAS DIVISION.

GEORGE FREDERICK HARMAN ..... Appointed 7th of December, 1872.

#### CHANCERY DIVISION.

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### PRACTICE REPORTS.

THOMAS TAYLOR ROLPH ..... Appointed 1st of March, 1879.

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## ABBREVIATIONS.

A. J. Act. ....	Administration of Justice Act.
App. Cas. ....	Appeal Cases, House of Lords and Privy Council.
A. R. ....	Appeal Reports (Ontario).
C. P. D. ....	Common Pleas Division.
C. L. J. ....	Canada Law Journal
C. L. T. ....	Canada Law Times.
C. S. C. ....	Consolidated Statutes of Canada.
Chy. ....	Grant's Reports.
Chy. D. ....	Chancery Division,
Con. Stat. N. B. ....	Consolidated Statutes of New Brunswick.
Dom. ....	Dominion of Canada.
E. C. ....	Election Cases.
G. O. ....	General Orders of the Court of Chancery.
H. E. C. ....	Hodgins' Election Cases.
Imp. ....	Imperial Statutes.
Man. ....	Manitoba.
Ont. ....	Ontario.
O. J. A. ....	Ontario Judicature Act.
O. R. ....	Ontario Reports.
O. S. ....	Old Series Queen's Bench Reports.
P. E. I. ....	Prince Edward Island.
P. Q. ....	Province of Quebec.
P. R. ....	Practice Reports.
Q. B. D. ....	Queen's Bench Division.
Que. ....	Province of Quebec.
R. G. ....	Rules of Court.
R. S. N. S. ....	Revised Statutes of Nova Scotia.
R. S. O. ....	Revised Statutes of Ontario, 1877.
S. C. ....	Same Case.
S. C. R. ....	Supreme Court Reports.
U. C. L. J. ....	Upper Canada Law Journal.
U. C. L. J. N. S. ....	Upper Canada Law Journal New Series.

# ADDENDA ET CORRIGENDA.

## Column.

60—	7	lines from bottom, for 2 O. R. 45, read 2 O. R. 451.
64—	5	" " " and " to.
	4	" " " H. & W. " p. 297.
151—	2	" " Omit Ex :
186—	23	" from top for 719 " 791.
196—	9	" from bottom, " A. B. " A. R.
210—	9	" " " P. R. " O. R.
222—	17	" " " Plamby " Palmby.
255—	4	" from top, Insert affirmed in part, 12 O. R. 593.
297—	15	" " for 5 O. R. 516 read <i>Schaffer v. Dumble</i> , 5 O. R. 716.
301—	32	" " Insert <i>Regina v. Arscott</i> , 9 O. R. 541, p. 633.
308—	20	" from bottom, for 411 read 441.
334—	30	" from top, " 9 O. R. " 7 O. R.
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533—	29	" " " 61 " 612.

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# DIGEST

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## THE REPORTED CASES

IN

### THE SUPERIOR COURTS OF ONTARIO,

AND

### THE SUPREME COURT OF CANADA,

CONTAINED IN VOLUMES

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#### ABANDONMENT.

- I. OF ACTION—*See* COSTS.
- II. OF SEIZURE—*See* SHERIFF.
- III. OF SHIP—*See* INSURANCE.

#### ABATEMENT.

OF ACTION—*See* ACTION.

#### ABSCONDING DEBTOR.

- I. JUDGMENT, 1.
- II. ATTACHMENT, 1.

##### I. JUDGMENT.

After judgment has been entered against an absconding debtor pursuant to the finding of a County Court Judge on a reference under R. S. O. c. 68 s. 9, the Master in Chambers has no jurisdiction to set aside the judgment at the instance of another creditor who wishes to be let in to defend. *Wills v. Carroll*, 10 P. R. 142—Chy. D.

##### II. ATTACHMENT.

Goods were sold to the defendant by the plaintiffs upon a five months' credit, and he refused to accept a bill of exchange at five months for their price. The plaintiffs, before the expiration of the five months, issued a writ of attachment against the defendant under the Absconding Debtors Act, R. S. O. c. 68, on an affidavit that defendant was indebted to them for goods

sold and delivered: Held, that to bring a case within the statute, there must be a debt due and payable at the time of the issuing of the writ, and that in this case there was no such debt as sworn to. The attachment was therefore set aside. *Kyle et al. v. Barnes*, 10 P. R. 20.—Dalton, *Master*—Cameron.

Semble, that in proceedings of this kind the existence of the debt itself may be enquired into. *Ib.*

The mere fact that a writ of attachment against an absconding debtor is in the sheriff's hands does not bind the debtor's land, and the land is not bound until seizure. *Robinson v. Bergin*, 10 P. R. 127.—Dalton, *Master*.

The sheriff's bailiff went to and entered upon the land of the debtor, on which his family resided, and finding there no goods, did not leave any one in possession; he said that he had no instructions beyond the warrant to seize the land; he told the debtor's wife at the time that the land would be sold, but he did no other act of seizure:—Held, that there was no seizure, and that *fi. fa.* lands placed in the sheriff's hands subsequent to the writ of attachment, were entitled to priority. *Ib.*

On the 25th of January, 1884, seven warrants of attachment at the instance of different plaintiffs were issued out of a Division Court against the goods of the defendant, an absconding debtor, and under them the bailiff seized certain goods. Subsequently and on the same day a writ of attachment was issued by the plaintiff in this suit against the defendant as an absconding debtor, and the goods seized by the bailiff were delivered up by him to the sheriff pursuant to section 16 of the Absconding Debtors Act. Five other Division Court attachments and one County

Court attachment were afterwards issued. Judgments were recovered by all the attaching creditors; executions were issued in the suits in the Superior and County Courts; and the clerk of the Division Court furnished the sheriff with a certified memorandum of the judgments in that Court, by virtue of which each creditor mentioned in it was entitled for the purpose of sharing in the proceeds to be treated as a plaintiff who had obtained judgment and sued out execution. Pending this suit an order was made for the sale of the goods attached under the writ, and the goods were sold, and the proceeds of the sale paid into Court. Upon a motion for distribution of the moneys in Court the plaintiffs claimed payment of their costs of suit in priority to all other claims. It was ordered that the costs of issuing the plaintiff's writ, and the fees and charges paid to the sheriff for executing it should be paid first out of the fund, because these costs and charges were necessarily incurred in seizing, recovering, and preserving the property, and that any fees which had been incurred in the Division Court in issuing the warrants of attachment on the 25th January, and seizing the property and holding it till it was delivered to the sheriff should also be paid out of the fund, and also the costs of the order directing the sheriff to sell, and the costs of this application, and that after payment of these charges the fund should be distributed ratably among the creditors. *Darling et al. v. Smith*, 10 P. R. 360.—Osler.

On the 27th of September, 1884, the sheriff seized certain goods of the defendant under two writs of execution. On the 30th, a writ of attachment under the Absconding Debtors Act, was issued and placed in the sheriff's hands, under which he seized all the defendant's property, credits, and effects. On the 1st and 2nd October, two more writs of attachment were placed in his hands. On the 13th of October, the sheriff sold under the executions and realized enough to satisfy them; the moneys remaining in his hands pending these proceedings. On the 20th of October, the sheriff received a certificate under the Creditors Relief Act, 1880, and another certificate on the 24th. On the 26th he sold the balance of the defendant's property, &c., seized by him. After this various certificates and executions were received by him. On the 14th of October, he had made the entry in his book under the Creditors Relief Act. None of the attaching creditors had placed executions in the sheriff's hands:—Held, that as the proceedings under the Absconding Debtors Act had been commenced prior to the sale of the goods, and therefore prior to the sheriff being required to act under the Creditors Relief Act, the latter did not supersede the former, so that the moneys realized were subject to such former Act, and must be distributed thereunder: that the proceedings under the latter Act were not well taken; and that the creditors who had certificates, to come within the former Act, must obtain judgment and execution in the ordinary mode. *Macfie v. Pearson*, 8 O. R. 745.—Rose.

#### ABSTRACT OF TITLE.

See SALE OF LAND.

#### ACCEPTANCE.

See SALE OF GOODS.

#### ACCIDENT.

See NEGLIGENCE.

#### ACCOMPLICE.

EVIDENCE OF—See CRIMINAL LAW.

#### ACCORD AND SATISFACTION.

See *Brundage v. Howard et al.*, 13 A. R. 337.

(See 48 Vict. c. 13, s. 6.)

#### ACCOUNT.

##### I. ACTIONS FOR AN ACCOUNT, 4.

##### II. REFERRING MATTERS OF ACCOUNT—See ARBITRATION AND AWARD.

##### III. ACCOUNTS BEFORE THE MASTER.

##### 1. Generally—See PRACTICE.

##### 2. Mortgage Suits—See MORTGAGE.

##### I. ACTIONS FOR AN ACCOUNT.

See *Harper v. Culbert et al.*, 5 O. R. 152; *Cowan v. Besserer et al.*, 5 O. R. 624; *Carnegie v. Federal Bank of Canada*, 8 O. R. 75; *Re Kirkpatrick—Kirkpatrick v. Stevenson*, 10 P. R. 4; *Cameron v. Bickford*, 11 A. R. 52.

#### ACTION.

##### I. BY AND AGAINST WHOM MAINTAINABLE, 5.

##### II. NOTICE OF ACTION, 5.

##### III. CAUSE OF ACTION, 6.

##### IV. CROSS ACTION, 6.

##### V. BY AND AGAINST PARTICULAR PERSONS.

##### 1. By Persons Aggrieved, 6.

##### 2. By Assignee of Chose in Action—See CHOSE IN ACTION.

##### 3. By and Against other Persons—See THE SEVERAL TITLES.

##### VI. PARTIES—See PLEADING.

##### VII. JOINDER OF CAUSES OF ACTION—See PLEADING.

##### VIII. DISCLAIMER, 6.

##### IX. ABATEMENT OF ACTION, 6.

##### X. COMPROMISING OR SETTLING ACTIONS, 7.

##### XI. CONSOLIDATING ACTIONS—See PRACTICE.

##### XII. DISMISSING ACTIONS—See PRACTICE.

#### XIII. SUSPENSE FELON.

#### XIV. RESTRAIN.

#### XV. REVIVING AND R.

##### I. BY AND AGAINST.

Held, following R. 496, that the creditors, could aside a chattel debt was incurred *Cuthbertson*, 10 C.

The defendant went in Toronto Dolly for the risk of the city, such property. Both intended that the moved along Sher Under a by-law prohibited under a p into, along, of written permission this case no such in the course of h line of the track was upset, thus for two days, du sustained loss by damage to their A., dissenting,) was liable for the J. A., as the plain superior right of street, a duty was per precautions arising from obst of the building of removal, and whi removed along th the traffic. *Toronto Dolly et al.*, 12

Where a person others is disentitled cannot do so on be *Dillon v. The Town* See *Beatty et al.* p. 7.

##### II. N.

A returning officer an action for pena tion Act, R. S. O. R. 65.—Q. B. D.

To a chief constab arrest. See *McK* To constable in bounding cattle. R. 625.

To Division Co *Glass et al.*, 11 O.

To registrar in anterior to his dism the County of Bruce

## XIII. SUSPENSION OF ACTIONS IN CASES OF FELONY, 7.

## XIV. RESTRAINING ACTIONS—See INJUNCTION.

## XV. REVIVING ACTIONS—See SCIRE FACIAS AND REVIVOR.

## I. BY AND AGAINST WHOM MAINTAINABLE.

Held, following *Parkes v. St. George*, 10 A. R. 496, that the plaintiffs not being execution creditors, could not maintain an action to set aside a chattel mortgage on the ground that the debt was incorrectly stated therein. *Hyman v. Cuthbertson*, 10 O. R. 443—Q. B. D.

The defendant Jefferys, owner of a frame tenement in Toronto, agreed with his co-defendant Dollery for the removal thereof to another part of the city, such removal to be made at D.'s own risk and without damage to that or any other property. Both defendants contemplated and intended that the house was to be drawn and moved along Sherbourne street for some distance. Under a by-law of the city, all persons were prohibited under a penalty from moving any building into, along, or across any street without the written permission of the board of works. In this case no such permission was obtained, and in the course of hauling the building along the line of the track of the plaintiffs one of the sills was upset, thus preventing its further removal for two days, during which time the plaintiffs sustained loss by the non-receipt of fares and damage to their property:—Held, (Burton, J. A., dissenting,) that Jefferys, as well as Dollery, was liable for the loss so occasioned. Per Osler, J. A., as the plaintiffs had, by their charter, the superior right of user and occupation of the street, a duty was cast upon J. to see that proper precautions were taken to prevent injury arising from obstructing the railway by means of the building of which he was procuring the removal, and which could not from its size be removed along the street without obstructing the traffic. *Toronto Street Railway Company v. Dollery et al.*, 12 A. R. 679.

Where a person suing in behalf of himself and others is disentitled to sue on his own behalf, he cannot do so on behalf of the others interested. *Dillon v. The Township of Raleigh*, 13 A. R. 53.

See *Beatty et al. v. Neelon et al.*, 9 O. R. 385, p. 7.

## II. NOTICE OF ACTION.

A returning officer is not entitled to notice in an action for penalties under the Ontario Election Act, R. S. O. c. 10. *Walton v. Appohn*, 5 O. R. 65.—Q. B. D.

To a chief constable in an action for malicious arrest. See *McKay v. Cummings*, 6 O. R. 400.

To constable in an action of replevin for impounding cattle. See *Ibbotson v. Henry*, 8 O. R. 625.

To Division Court bailiff. See *Pardee v. Glass et al.*, 11 O. R. 275.

To registrar in an action to recover fees received anterior to his dismissal. See *The Corporation of the County of Bruce v. McLay*, 11 A. R. 477.

As to raising objection to want of notice of action by plea. See *Verratt v. McAulay et al.*, 5 O. R. 313; *McKay v. Cummings*, 6 O. R. 400.

To inspector of fisheries, under 31 Vict. c. 60. See *Venning v. Steadman*, 9 S. C. R. 206.

## III. CAUSE OF ACTION.

Where one brought action against the registered owners of a certain vessel for the value of goods supplied before they became such owners, not on the order of the defendants, but on the order of one G. C., between whom and the defendants no relation of agency was proved:—Held, that the plaintiff could not recover:—Held also that it was open to the defendants to shew that their real interest was that of mortgagees, though ostensibly registered owners. The fact that the vessel got the benefit of the supplies and necessities did not make the registered owner liable. *Nelson v. Wyle et al.*, 8 O. R. 82.—Boyd.

In an action under 40 Vict. c. 43, s. 47 (D.), brought in Ontario against a shareholder there resident, of a company whose head office was in another province, where judgment had been obtained by the plaintiff against the company, and execution thereon had been returned unsatisfied:—Held, reversing the judgment of Rose, J., 7 O. R. 435, that the cause of action against the shareholder was complete without the return unsatisfied of an execution against the company in Ontario. *Brice v. Munro et al.*, 12 A. R. 453.

See also *Brooks v. Conley et al.*, 8 O. R. 549; *Comtee et al. v. Canadian Pacific R. W. Co.*, 11 P. R. 149.

See also Subhead I., p. 5.

## IV. CROSS ACTION.

For compensation for defect in quality of goods sold. See *Turner v. Dominion Iron and Metal Co.*, 11 A. R. 315.

## V. BY AND AGAINST PARTICULAR PERSONS.

## 1. By Persons Aggrieved.

See *Verratt v. McAulay et al.*, 5 O. R. 313; *Atkins v. Ptolemy*, 5 O. R. 366.

## VIII. DISCLAIMER.

Costs after defendant disclaims any interest in the result of a suit. See *Wansley v. Smallwood*, 11 A. R. 439.

## IX. ABATEMENT OF ACTION.

Semble, that under O. J. Act rule 383, an action of seduction abates by the death of the plaintiff. See *Udy v. Stewart*, 10 O. R. 591.

The plaintiffs, formerly owners of a line of steamers, brought this action against the defendants, who were formerly owners of another line of steamers, alleging that by certain misrepresentations on the part of the defendants as to



certain contracts alleged by them to be held in connection with their line, they, the plaintiffs, were induced to enter into an agreement with the defendants for the amalgamation of the two lines and the formation, in connection with the defendants, of a joint stock company to own and run the same, and seeking damages in respect of such misrepresentations. One of the defendants died after issue joined.—Held that nevertheless the action could be proceeded with against the surviving defendants.—Held, also, that the action was rightly brought by the present plaintiff, and not by the company. *Bratty et al. v. Neelon et al.*, 9 O. R. 385.—Wilson.

#### X. COMPROMISING OR SETTLING ACTIONS.

A married woman can compromise an action brought in her own name against her husband. See *Fardon v. Fardon*, 6 O. R. 719.

Where certain creditors and the administrator were parties to an order in chambers compromising an action respecting certain assets of the estate.—Held, that they were bound by such compromise, and could not impeach in this administration proceeding the validity of securities which had been in question in the action compromised. *Merchants Bank v. Monteith*, 10 P. R. 467.

Notice given to compromise a criminal charge. See *Bell v. Riddell*, 10 A. R. 544, p. 50.

See also *Hall v. Griffith et al.*, 5 O. R. 478; *Friedrich v. Friedrich*, 10 P. R. 308; *S. C. Ib.* 546.

#### XIII. SUSPENSION OF ACTIONS IN CASES OF FELONY.

To an action for assault and battery defendant pleaded that before action brought the plaintiff laid an information before a magistrate, charging defendant with feloniously, &c., wounding the plaintiff, with intent to do him grievous bodily harm, thereby charging the defendant with felony: that defendant was brought before the magistrate, and committed for trial, which had not yet taken place: that the subject of both the civil and criminal prosecution was the same, and that plaintiff's civil right of action was suspended until the criminal charge was disposed of.—Held, on demurrer, plea good: and an order was accordingly made staying the civil action in the meantime. *Taylor v. McCullough*, 8 O. R. 309.—Rose.

#### ADDING PARTIES.

See PLEADING.

#### ADMINISTRATION.

I. OF ESTATES—See EXECUTORS AND ADMINISTRATORS.

II. OF INSURANCE COMPANY'S DEPOSIT—See INSURANCE.

#### ADMINISTRATOR.

See EXECUTORS AND ADMINISTRATORS.

#### ADMISSIONS.

See EVIDENCE.

#### ADVERSE POSSESSION.

See LIMITATION OF ACTIONS.

#### ADVERTISEMENT.

See SALE OF LAND BY ORDER OF THE COURT.

#### AGENT.

See PRINCIPAL AND AGENT.

#### AGREEMENT.

See CONTRACT.

#### AIR.

See *Carter v. Grasett*, 10 O. R. 331.

#### ALIEN.

Foreign trustee for infants. See *Re Andrews*, 11 P. R. 199.

#### ALIMONY.

See HUSBAND AND WIFE.

#### AMENDMENT.

I. OF CONVICTIONS—See INTOXICATING LIQUORS—JUSTICES OF THE PEACE.

II. OF PLEADINGS—See PLEADING.

III. OF JUDGMENTS—See JUDGMENT.

IV. OF EXECUTIONS—See EXECUTION.

V. IN CONTROVERTED ELECTION PROCEEDINGS—See PARLIAMENTARY ELECTIONS.

#### ANIMALS.

I. BY-LAWS REGARDING—See MUNICIPAL CORPORATIONS.

II. IMPOUNDING—See IMPOUNDING ANIMALS.

III. INJURY TO—See RAILWAYS AND RAILWAY COMPANIES.

Effect of Bills of Sale Act, R. S. O. c. 119, where animal conveyed by one of two owners. See *Gunn v. Burgess*, 5 O. R. 685, p. 58.

Interest on  
10 O. R. 131.

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I. GENERAL

II. COSTS

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## ANNUITY.

See WILL.

Interest on. See *Snarr et al. v. Badenach*, 10 O. R. 131.

## ANTE NUPtIAL SETTLEMENT.

See FRAUDULENT CONVEYANCE

## APPEAL.

## I. GENERALLY, 9.

## II. COSTS GENERALLY, 11.

## III. STAYING PROCEEDINGS PENDING APPEAL—See PRACTICE.

## IV. TO PRIVY COUNCIL—See PRIVY COUNCIL APPEALS.

## V. TO SUPREME COURT—See SUPREME COURT OF CANADA.

## VI. TO COURT OF APPEAL—See COURT OF APPEAL.

## VII. TO DIVISIONAL COURT—See HIGH COURT.

## VIII. FROM LOCAL JUDGE—See PRACTICE.

## IX. FROM COUNTY COURTS—See COUNTY COURT.

## X. FROM SURROGATE COURTS—See SURROGATE COURT.

## IX. FROM DIVISION COURTS—See DIVISION COURTS.

## XII. FROM ASSESSMENTS—See ASSESSMENT AND TAXES.

## XIII. FROM MASTERS—See PRACTICE.

## XIV. FROM MAGISTRATE—See SESSIONS.

## XV. FROM AWARDS—See ARBITRATION AND AWARD.

## XVI. FROM INJUNCTIONS—See INJUNCTION.

## XVII. FROM INTERPLEADER PROCEEDINGS—See INTERPLEADER.

## XVIII. FROM TAXATION—See COSTS.

## XIX. FROM ORDERS UNDER WINDING-UP ACTS—See CORPORATIONS.

## XX. IN APPLICATION FOR NEW TRIAL—See NEW TRIAL.

## XXI. IN CONTROVERTED ELECTION PROCEEDINGS—See PARLIAMENTARY ELECTIONS.

## XVI. FOR COSTS—See COSTS.

## I. GENERALLY.

A party who has been ordered by the court to attend for further examination after a refusal to answer questions, is in contempt if he does not; so attend, but that is not a bar to his appealing

from the order. Proceedings under the order will not be stayed pending the appeal. *MacGregor v. McDonald et al.*, 11 P. R. 518.—Dalton, Master—Armour.

The solicitor for the defendants (except Lewis) had given due notices of appeal, but through inadvertence set down the appeal on behalf of the defendants the gravel road company only. Under the circumstances stated in the judgment, the other defendants were allowed to set down their appeal. *Lewis v. The Talbot Street Gravel Road Co. et al.*, 10 P. R. 15.—Osler.

When a decision of the Court of Appeal in England is at variance with one of the Court of Appeal in this province, the latter should be followed here, as the former court is not the court of ultimate appeal for the province: *Sutton v. Sutton*, 22 Chy. D. 511, not followed. *MacDonald v. McDonald*, 11 O. R. 187—Chy. D.—Proudfoot.

Semble, where an appeal is made from the exercise of discretion by a judge, the court should not review such discretion. *Neill v. Travellers' Ins. Co.*, 9 A. R. 54; *Regina v. Richardson*, 8 O. R. 651. But see *Regina v. Meyer*, 11 P. R. 477.

It is the duty of an Appellate Court to review the conclusion arrived at by courts whose judgments are appealed from upon a question of fact when such judgments do not turn upon the credibility of any of the witnesses, but upon the proper inference to be drawn from all the evidence in the case. *Russell v. Lefrancois*, 8 S. C. R. 335.

As to reversing judgment of judge who tried the case on finding of fact. See *Merchants Bank of Canada v. Smith*, 8 S. C. R. 512.

Remarks upon reversing the findings of a judge or jury upon a question of fact or of mixed law and fact. *Scribner v. Kinloch et al.*, 12 A. R. 367.

Where the evidence is contradictory, the court will not interfere with the findings of the judge who tried the case. *Cook et al. v. Patterson*, 10 A. R. 645.

Where there is a direct conflict of testimony, the finding of the judge at the trial must be regarded as decisive, and should not be reversed in appeal by a court which has not had the advantage of seeing the witnesses and observing their demeanour while under examination. *Grassett v. Carter*, 10 S. C. R. 105.

The learned judge who tried the case, in which the evidence was conflicting and irreconcilable, rested his conclusion in favour of the defendant on the documentary evidence and the probabilities arising in the case. This court, while not differing from the judge as to the credibility of the parties or their witnesses, having come to a different conclusion on the whole evidence allowed the appeal and reversed the decision of the court below. *Cameron v. Bickford*, 11 A. R. 52. Reversed by the Privy Council. Not reported.

Held, that a document which has not been proved nor produced at the trial cannot be relied on or made part of the case in appeal. *Lionais v. Molson*, 10 S. C. R. 527.

The court will not hear an appeal where the court below, in the exercise of its discretion, has



47, and 48 of that Act to order references in open cases. *White v. Berner*, 10 P. R. 531.—Boyd. Followed in *The Union Loan and Savings Company v. Boomer*, 10 P. R. 630.—Rose.

An appeal from the Master's order directing a reference was treated as a substantive motion, and a reference was directed, under Rule 323 of the Judicature Act. *The Union Loan and Savings Company v. Boomer*, 10 P. R. 630.—Rose.

Held, that the matters in question in this case were proper for a trial by a judge, and that the plaintiff was not entitled to give prima facie evidence of a breach of contract, and then have a reference as to damages. *Cook et al. v. Patterson*, 10 A. R. 645.

#### (b) Appeal from Award.

The order of reference made by the presiding judge at the assizes was: "Upon the consent of the parties, I do order and direct that the matters in dispute between the plaintiff and defendant upon the issues joined in this action be referred," &c. It was urged that the action being one which involved the investigation of long accounts, the reference must be deemed to have been made compulsorily, and the consent to have been merely to the arbitrator named. It appeared that, as a matter of fact, the learned judge exercised no discretion, but, on the parties announcing their consent, he made the order; and at the time suggested the insertion of a clause authorizing an appeal, if such were desired, but it was not required:—Held, that the reference was a consent reference, and there was no appeal. *Webster v. Haggart et al.*, 9 O. R. 27.—C. P. D.

Held, affirming the judgment of the Queen's Bench (46 Q. B. 235), that an appeal will lie from an award made pursuant to a consent reference at nisi prius under section 205 C. L. P. Act. *McEwan v. McLeod*, 9 A. R. 239.

In the case of a voluntary nisi prius submission to arbitration in which a right of appeal is reserved by consent, the procedure is governed by R. S. O. c. 50, ss. 191, 192 and 193, and the time for appealing from the award runs from the date of filing. *McEwan v. McLeod*, 46 Q. B. 235, followed. *Shepherd v. The Canadian Pacific Railway Company*, 11 P. R. 517.—Boyd.

The cause was referred by court of nisi prius to arbitration, the award to be entered on the postea as the verdict of a jury. After the award the appellants obtained a judge's order for a stay of proceedings, and for the cause to be entered on the motion paper of the court below, to enable the appellants to move to set aside the award and obtain a new trial, on the ground that the arbitrators had improperly taken evidence after the case before them was closed. Before the term in which the motion was to be heard, appellants abandoned that portion of the order directing the cause to be placed on the motion paper, and gave the usual notice of motion to set aside the award and postea, and for a new trial, which motion, by the practice of the court, would be entered on the special paper. Defendant, in opposing such motion, took the preliminary objection that the judge's order should be rescinded before plaintiffs could proceed on their motion, and presented affidavits on the merits, and plaintiffs requested leave to read affidavits in reply, claim-

ing that defendant's affidavits disclosed new matter. This the court refused, and dismissed the motion, the majority of the judges holding that plaintiffs were bound by the order of the judge, and could not proceed on the special paper until that order was rescinded, the remainder of the court refusing the application on the merits. On appeal to the Supreme Court of Canada:—Held, that the cause was rightly on the special paper, and should have been heard on the merits, and the court should have exercised its discretion as to the reception or rejection of affidavits in reply, Strong, J., dissenting on the ground that such an appeal should not be heard. The Con. Stat. N. B. c. 37, s. 173, applies as well to motions for new trials, where the grounds upon which the motion is based are supported by affidavits, as in other cases. It makes no distinction, but applies to all "motions founded on affidavits." *Jones v. Tuck*, 11 S. C. R. 197.

### III. AWARD.

#### 1. Execution.

Three arbitrators on the close of the evidence agreed on their finding, and a minute thereof was made in writing by one of them but not signed, and it was understood that nothing further was to be done but have a formal award drawn up and executed. Next day the award was drawn up and executed by two of the arbitrators in the presence of each other, but in the absence of the third arbitrator, who two days afterwards executed it in the presence of one of the other arbitrators. In an action on such award:—Held, affirming the judgment of Haggart, C. J., that the award should have been executed by the three arbitrators together, and that it was invalid. *Nott v. Nott*, 5 O. R. 283.—C. P. D.

### IV. SETTING ASIDE AND STAYING PROCEEDINGS ON AWARD.

#### 1. For Reception or Rejection of Evidence.

The improper reception or rejection of evidence by an arbitrator, without any corrupt intent, does not amount to legal misconduct upon which an award will be set aside. *Webster v. Haggart et al.*, 9 O. R. 27.—C. P. D.

The evidence received consisted in statements made by the plaintiff ante litem motam in substance confirmatory of his evidence before the arbitrator; and the rejection consisted in the arbitrator's refusal to receive parts of the plaintiff's examination without the whole being received. It did not appear that the arbitrator was influenced by the evidence objected to and he made no request to be allowed to reconsider his award:—Held, that while the evidence objected to was not strictly admissible, the award could not be interfered with on such ground, and especially so since R. S. O. c. 50, s. 289, when it did not appear to have occasioned any miscarriage on the merits. *Ib.*

#### 2. Other Cases.

Communications with arbitrators after evidence closed. See *Herring and Napawee, Tamworth and Quebec R. W. Co.*, 5 O. R. 349.

The award in this case having been directed to be made within a year by an order of the Chancery Division where the parties were litigating concerning it:—Held, that the motion to set it aside or refer back should have been made in that division. *In re the Corporation of the Township of Muskoka and the Corporation of the Village of Gravenhurst*, 6 O. R. 352.—Cameron.

The bill in this case was filed to rectify an award made under a submission to arbitration between the parties, on the ground that the arbitrators considered matters not included in the submission, and had divided the sums received by the defendant from the plaintiffs, because defendant's brother and partner was a party to such receipt, although the partnership affairs of the defendant and his brothers were excluded from the submission. The bill prayed that the award might be amended and the defendant decreed to pay the amount due the plaintiffs on the award being rectified, and that, in other respects, the award should stand and be binding on the parties; there was also a prayer for general relief:—Held, affirming the judgment of the court below, that to grant the decree prayed for would be to make a new award which the court had no jurisdiction to do, but:—Held, also, reversing the decision of the court below, that under the prayer for general relief the plaintiffs were entitled to have the award set aside. *Vernon v. Oliver*, 11 S. C. R. 156.

#### V. COSTS.

Where it was determined that neither party was entitled to the costs of arbitration under the statute; but the company, in order to take up the award, paid the whole of the arbitrators' fees:—Held, that a summary order could not be made to recoup the company for one-half the fees out of the moneys payable to the land-owner, and such order was refused without prejudice to an action for the same purpose. *Re Philbrick and Ontario and Quebec R. W. Co.*, 11 P. R. 373.—Boyd.

Costs of arbitration and award where proceedings stayed in an action on a policy pending arbitration as to amount of loss. See *Hughes v. British American Ins. Co.*, and *Hughes v. The London Assurance Co.*, 7 O. R. 465; *Hughes v. The Hand in Hand Ins. Co.*, 1b. 615.

#### ARBITRATOR.

See ARBITRATION AND AWARD.

#### ARCHITECT.

Although an architect, employed by the owner, for reward to superintend the construction of a house may, as between the latter and the contractor by the terms of their own agreement be in the position of an arbitrator and his decision as between them unimpeachable except for fraud or dishonesty, yet as between himself and his employer he is answerable for either negligence or unskilfulness in the performance of his duty as architect. *Irving v. Morrison*, 27 C. P. 242 approved. *Badgley v. Dickson*, 13 A. R. 494.

#### ARREST.

I. ON ATTACHMENT—See ATTACHMENT OF THE PERSON.

II. ON *Ca. Sa.*—See CAPIAS AD SATISFACIENDUM.

III. *E. A. L.*—See BAIL.

IV. MALICIOUS ARREST—See MALICIOUS ARREST, PROSECUTION AND OTHER OFFENCES.

It is of no consequence where the domicile of a person may be, or to what country he is bound by allegiance as a subject or citizen, if he comes to this province, and reside here, and contract debts, and is about to quit the country (that is in fact to change his residence to a foreign country, even though that country be his place of domicile) with the intent to defraud his creditors, he is subject to arrest as it prevails in this province. *Kersterman v. McLellan*, 10 P. R. 122.—Wilson.

Held, that a defendant cannot rely on a change of residence to a foreign country so as to avoid the law of arrest, to which he was subject in this province at the time he incurred the debt upon which the action is brought, when that change of residence has been effected by a fraudulent flight to avoid arrest. *Ib.*

#### ASSAULT.

ACTION FOR—See TRESPASS.

#### ASSESSMENT AND TAXES.

##### I. ASSESSMENT.

1. *Income and Property of Corporations*, 16.

2. *Lands*.

(a) *Generally*, 17.

(b) *Crown Lands*, 18.

(c) *Non-Resident Lands*, 19.

II. APPEAL TO COURT OF REVISION AND COUNTY JUDGE, 20.

III. COLLECTION OF RATES, 21.

IV. SALE OF LAND FOR TAXES.

1. *Proof of Taxes in Arrear*, 21.

2. *Warrant to Sell*, 22.

3. *Objections Cured by Statute*, 22.

4. *Other Cases*, 23.

V. MISCELLANEOUS CASES, 24.

VI. TAXES BETWEEN LANDLORD AND TENANT—See LANDLORD AND TENANT.

VII. EXEMPTIONS BY MUNICIPALITIES—See MUNICIPAL CORPORATIONS.

VIII. COVENANT FOR TAXES—See LANDLORD AND TENANT.

##### I. ASSESSMENT.

1. *Income and Property of Corporations*.

The plaintiff company was a foreign corporation with its head office in England, but carry

ing on insurance agency office at office for Canada insurance premium agent of the company transacted under 43 Vict. as taxable income the company agent paid taxes partly derived from received, and then been previously tion, to the head the municipality ment was made. *The Phoenix Insurance Co. v. The Corporation*, 7 O. R. 343.—F.

By sec. 25 of the Act of 1882 it is taxes levied and John shall be the value of the real part of the city's personal estate of the deemed and declared of the said capital stock, in stock companies, stated in business levying of a poll tax that "the whole levied upon the personal, and rate amount of the assessed, provided rated above the purposes of the same Act provisions companies and corporations this Act, in like manner the purposes of such or any agent, or manager or corporation to be the owner of capital stock and corporation, and shall proceeded against president of the assessed under the on real and personal in the aggregate, stock of the bank was only \$1,000,000 taxes on that amount not disputed that and personal property appeal from the St. Wick, refusing a cess assessment:—Held, the real and personal part of its capital stock could not exceed namely, \$1,000,000 11 S. C. R. 484.

A. & H. were the north and centre were both occupied when the buildings

ing on insurance business in Canada, with an agency office at Kingston, Ontario, and the head office for Canada at Montreal:—Held, that insurance premiums received at Kingston by the agent of the company there, for insurance business transacted through him as such agent, were, under 43 Vict. c. 27 O., assessable at Kingston as taxable income or personal property against the company and its said agent, although the agent paid taxes on his own income, which was partly derived from commissions on the premiums received, and the fact that the premiums, having been previously sent by the agent, after collection, to the head office in Montreal, were not in the municipality of Kingston, when the assessment was made, did not make any difference. — *The Phoenix Insurance Company of London et al. v. The Corporation of the City of Kingston et al.*, 7 O. R. 343.—Ferguson.

By sec. 25 of the Saint John City Assessment Act of 1882 it is provided that "all rates and taxes levied and imposed upon the city of Saint John shall be raised by an equal rate upon the value of the real estate situate in the city, and part of the city to be taxed and upon the personal estate of the inhabitants and of persons licensed and declared to be inhabitants or residents of the said city. \* \* \* And upon the capital stock, income, or other thing of joint stock companies, corporations, or persons associated in business." And after providing for the levying of a poll tax, such section goes on to say that "the whole residue to be raised shall be levied upon the whole ratable property, real and personal, and ratable income and real value, and amount of the same as nearly as can be ascertained, provided that joint stock shall not be rated above the par value thereof." Sec. 28 of the same Act provides that "all joint stock companies and corporations shall be assessed, under this Act, in like manner as individuals; and for the purposes of such assessment the president, or any agent, or manager of such joint stock company or corporation shall be deemed and taken to be the owner of the real and personal estate, capital stock and assets of such company or corporation, and shall be dealt with and may be proceeded against accordingly." J. D. L., the president of the bank of New Brunswick, was assessed under the provisions of the above Act, on real and personal property of the bank valued, in the aggregate, at \$1,100,000. The capital stock of the bank at the time of such assessment, was only \$1,000,000, and he offered to pay the taxes on that amount which was refused. It was not disputed that the bank was possessed of real and personal property of the assessed value. On appeal from the Supreme Court of New Brunswick, refusing a certiorari to quash the said assessment:—Held, Fournier J. dissenting,—That the real and personal property of the bank are part of its capital stock, and that the assessment could not exceed the par value of such stock, namely, \$1,000,000. *Ex parte James D. Lewin*, 11 S. C. R. 484.

## 2. Lands.

### (a) Generally.

A. & H. were the respective owners of the north and centre parts of a certain lot, which were both occupied by H. until the year 1871, when the buildings were burned, and H. went

out of possession. He subsequently paid the taxes up to 1873, when he left the neighbourhood, and did not return until 1883, and then found his part and that of A.'s had been sold for taxes, but he had received no notice of any taxes being in arrear. In an action by H. and his wife, who had subsequently acquired his title, it appeared that both pieces had been assessed separately in 1872, together in 1873, were not assessed at all in 1874, were assessed together as the "north half of lot 13, one-tenth of an acre" in 1875, together as the "north part of lot 13" in 1876, in one parcel as "north part 13" in 1877, and that they had been sold for the taxes due on both parcels down to 1877 and for those on the north piece for 1878:—Held, that the tax sale was invalid and could not be sustained, and that the plaintiffs were entitled to recover possession. *Hill v. Macaulay*, 6 O. R. 251.—Ferguson.

In the year 1875 a lot of land containing 200 acres and patented as one lot was assessed on the resident roll as lot 114, 200 acres, value \$1,000. From 1876 to 1878, it was similarly assessed. In 1879 it was also so assessed, except that the quantity of land was stated to be 100 instead of 200 acres. The whole 200 acres was occupied by a tenant who duly paid the taxes for each year including 1879. On the non-resident roll for 1879, the east half of the lot appeared assessed as 100 acres, value \$800. By reason thereof it was returned to the county treasurer as in arrear for the taxes of 1879, and a sale thereof made:—Held, the sale for taxes was invalid; that the assessment on the resident roll for 1879, was of the whole lot upon which the taxes were paid, the mistake in stating the quantity of land to be 100 acres not making such assessment less an assessment of the whole lot, while the error of putting the east half on the non-resident roll could not affect the owner's right to the land. *Jeffery v. Hewis*, 9 O. R. 364.—C. P. D.

Quere, whether a person who has laid out land into town lots or village lots for sale cannot afterwards if he find he cannot dispose of them as such, or for any other reason replace his land as it was before. *In re G. W. Allan*, 10 O. R. 110.—Wilson.

See also *Carson v. Vitch*, 9 O. R. 706.

### (b) Crown Lands.

In 1808 an order in council was passed for a grant of land to W., the daughter of a U. E. Loyalist. In 1818 certain land was located thereunder, and a patent issued therefor. In 1819 W. petitioned the Governor-in-Council, stating that this was by mistake and without any authority from her; and in 1820 an order in council was passed allowing her to surrender the land and to locate other land in lieu thereof. In 1820, before the surrender, the surveyor-general furnished the treasurer with a list of lands in this district, specifying this lot as deeded to W. The land was thereupon assessed, and in 1831, having been returned by the treasurer to the sheriff as in arrear for the taxes for the years 1820-9, and liable for sale, it was in that year sold to S., and a tax-deed given in 1832. In 1839 S. conveyed to N., who in 1840 conveyed to G., through whom the plaintiff claimed. In 1839 N. petitioned the Governor-in-Council, stating that he was the assignee of the tax-purchaser: that he



had discovered that the surveyor-general's return was in error, the land having been surrendered, but that under the circumstances the tax-sale was regular, and that it should be confirmed, and a patent issued to him. In 1840 an order in council was passed, stating that if N.'s tax-title was valid he did not require a patent, but if not, the government had no power to make a free grant of the land. In 1868 the Crown granted the land to H., who conveyed to the defendant:—Held, (reversing Burton, J., 6 O. R. 564,) that as under 59 Geo. III. c. 7 and 6 Geo. IV. c. 7, only lands granted by the Crown were to be liable to assessment and sale, and as, under the circumstances, the lands never passed out of the Crown and vested in W.—the formal surrender being taken rather as a precautionary than as a necessary act, and the mistake of the surveyor-general in not giving notice of the surrender could not make the land liable to be sold for taxes as against the Crown—the tax-sale was invalid, and nothing passed under it; and that the defendant, claiming under the subsequent patent, was entitled to the land: Quere also, whether the plaintiff had any claim against the Crown for the moneys paid at the tax sale; at all events after the tax sale the parties dealt with the land with notice of the difficulties that existed. *Moffatt v. Scratch*, 8 O. R. 147—C. P. D.—affirmed, 12 A. R. 157

See *Stevenson v. Traynor*, 12 O. R. 804, p. 23.

#### (c) Non-Resident Lands.

By R. S. O. c. 180, ss. 108, 109, the county treasurer is to furnish the clerk of each municipality with lists of lands three years in arrear for taxes, and such clerks are to keep the lists in their offices for inspection, and are to give copies to the assessors who are to notify the occupant and owner, if known, by means of the assessment notice, that the land is liable to be sold for arrears of taxes. By ss. 155 and 156 a tax deed is to be final and binding on the former owners and all claiming under them if the lands are not redeemed in one year, and the deed is to be valid against all parties if not questioned by some interested person within two years from the time of sale. The land in question was, in 1879, assessed as non-resident. Defendant became the owner in 1878, and having come to reside thereon in the former year, improperly paid these taxes to the collector instead of to the treasurer. No notice of arrears was given to the then owner and occupant, and they were not entered on the roll for 1882, as required by the Act. The defendant paid all taxes subsequently demanded, including those for 1882, but the land was, notwithstanding, put up and sold for the taxes of 1879, a trifling sum, on the 30th December, 1882. The treasurer's deed was dated 15th February, 1884:—Held, that the sale could not be supported, as the notice required by s. 109, that the land was liable to be sold for taxes, had not been given, and that such irregularity was not cured by secs. 155 and 156 of the Act. *Hutchinson v. Collier*, 27 C. P. 249; *Church v. Fenton*, 28 C. P. at p. 404, doubted by Wilson, C. J.; Per Armour, J.—The substantial compliance with the provisions of R. S. O. c. 180, ss. 108-111 inclusive, is a condition precedent to the right to sell non-resident land for taxes:—Quere, per Wilson, C. J., whether there was not evidence that

the land was not sold in a "fair, open, and candid manner." Observations on the impropriety of tax-sales as now conducted under legislative authority. *Devrell v. Coe*, 11 O. R. 222—Q. B. D.

H. being the owner of four islands called them O., F., B. and C. islands, and improved O. by building a house, &c., on it. O. had previously been sometime known as island D., and was described by that name in the patent. H. ascertained what taxes he owed, and paid all that were demanded. The assessor from general information assessed the islands, and so assessed island D. on the non-resident roll for the years in question. The taxes were not paid on island D. as assessed on the non-resident roll, and it was consequently sold at a tax sale. In an action by H. to set aside the sale, in which it was shewn that F. island was assessed by mistake as the improved island on the resident roll, and O. island on the non-resident roll as island D., it was:

—Held, (affirming the judgment of Ferguson, J.,) that as to errors in non-resident land assessments, under the provisions of the Assessment Act, R. S. O. c. 180, the county treasurer is not bound by the roll, but can receive evidence and correct errors therein, and that in this case he could have done so as to the "incorrect description" and the "erroneous charge" based thereon, and that the taxes were paid, and "satisfactory proof" being made on these points, it would have been his duty to stay the sale, and if so it was the duty of the court to interfere and undo the wrong. The Assessment Act recognizes the possibility of evidence being given to evade or neutralize entries upon the roll and official books. And the sale was set aside. *Hall v. Farquharson*, 12 O. R. 598—Chy. D.

See *Jeffery v. Horis*, 9 O. R. 364, p. 18.

#### II. APPEAL TO COURT OF REVISION AND COUNTY JUDGE.

Where an assessment roll was returned to the county clerk's office on the 1st May, but the certificate was neither signed nor sworn to till 4th May, and additions were made to the roll between the 1st and 4th May, and the notice to the parties assessed (signed) informed them that they must give notice of appeal within fourteen days from the latter date:—Held, that a notice of appeal given on 18th May was in time, because the roll was not "delivered to the clerk completed and added up with the certificates and affidavits attached" before 4th May; and that the county judge should not therefore have dismissed an appeal to him on the ground that the notice was not served within fourteen days from 1st May, as well as because that was not the ground taken before the Court of Revision:—Held also, that the Court of Revision proceeded on that ground their decision would have been binding on the county judge. A mandamus was therefore directed to the county judge to try the appeal. *In re Hon. G. W. Allan*, 10 O. R. 110—Wilson.

Semble, the county council having extended the time for the return of the roll to the 15th of June, although that date was disregarded by all parties to this application, the applicant had no right the power to appeal within fourteen days from such date. *Id.*

The defect was no income tax. The balance of a mutual insurance company's expenses. The statute required the assessor to apply in return notes appealed to the county judge. The county judge brought the matter before the court, and the court held that the assessor was liable to the plaintiff. *The Company of City of London*

In an action for the recovery of a corporation of members of the county council, increasing the rate of taxation in that town to \$132,000 over the existing taxes there. The proceedings were set aside on the ground of fraud and conspiracy. The holding of the members thereof to increase the assessment was admissible evidence of the value of the land at the highest of \$80,000. It was held that the members of the County Council as county assessors were not liable for the assessment of the land, but that the county council was liable for the assessment of the land. *Canadian Land Municipality of L*

#### III. C.

Semble, where the property, and the assessment is put in the hands of the county council, the county council is liable for the assessment. *O. R. 706—C. P.*

#### IV. SAL.

##### 1. Proc.

On an application for a writ of mandamus to carry out the provisions of the Vendor's Act, R. S. O. c. 180, ss. 108-111, the court held that the vendor was not liable to the purchaser for the assessment of the land. *Id.*

The defendants assessed the plaintiffs for \$590.52 on an alleged income of \$26,000, being the balance of moneys received by the plaintiffs, a mutual insurance company, for premiums, &c., after payment of the current year's losses and expenses. The plaintiffs contended that there was no income for that the said balance, under the statute relating to the plaintiffs, was to be applied in reduction of the amounts on the premium notes for the ensuing year, and they appealed to the Court of Revision who confirmed the assessment. They then appealed to the county judge who dismissed the appeal. The plaintiffs then paid the amount under protest, and brought this action to recover same back:—Held, that the decision of the county judge was final; and this action was therefore not maintainable. *The London Mutual Fire Insurance Company of Canada v. The Corporation of the City of London*, 11 O. R. 592.—Proudfoot.

In an action to restrain the defendants, the corporation of the township of Dysart and the members of the Court of Revision thereof, from increasing the assessment on the plaintiff's lands in that township to \$243,113.75, an increase of \$132,000 over the previous year, and from levying taxes thereon, the plaintiffs alleged that the proceedings of the Court of Revision were all parts of a fraudulent and improper arrangement and conspiracy that had been entered into before the holding of the said Court of Revision by the members thereof in conjunction with others, to increase the assessment of the plaintiffs. No evidence was adduced as to the actual or assessable value of the lands, but the plaintiffs stated that the highest bid they had had for them was \$0,000. It was further alleged that the members of the Court of Revision had before their election as councillors, complained that the company's assessment was not high enough, and had procured their election partly through announcing that if they were elected the assessment would be increased, and that they had held a secret meeting with other persons and arranged for bringing on appeals to that Court:—Held, affirming the decision of the Chancery Division, 10 O. R. 495,] that the matters complained of were not sufficient to affect the judgment of the Court of Revision so as to render it void for fraud; and that the plaintiffs had no remedy other than by an appeal to the Stipendary Magistrate of Haliburton, under R. S. O. c. 6, s. 23. *Canadian Land and Emigration Company v. The Municipality of Dysart et al.*, 12 A. R. 80.

### III. COLLECTION OF RATES.

Semble, where there is a sufficient distress on the property, and the municipality by its own process puts it out of its power to distrain, sec. 10 of R. S. O. c. 180, does not avail to give the right to collect by action. *Carson v. Feitch*, 9 O. R. 706—C. P. D.

### IV. SALE OF LAND FOR TAXES.

#### 1. Proof of Taxes in Arrear.

On an application under the Vendors and Purchasers Act, R. S. O. c. 109, to compel a purchaser to carry out a purchase, it was shewn that the vendor claimed through a tax sale, and had declined to produce any further evidence of the

validity of the tax sale than the treasurer's deed, and what might be obtained from the Treasurer's books, returns, and warrants, to which he referred the purchaser:—Held, that the treasurer's lists of lands in arrear for taxes furnished to the warden would be as valid evidence of the non-payment as the treasurer's warrant to the sheriff under 16 Vict. c. 182, s. 55, was held to be by the judgment in *Clarke v. Buchanan*, 25 Chy. 559; and that coupled with the warrant from the warden they would be conclusive, and would afford evidence of nonpayment up to the time of the sale:—Held, also, that the certificate of the treasurer that the land was not redeemed is sufficient, and that an affidavit cannot be required from a public officer as to the proper discharge of his duty. More evidence may be required as between a vendor and purchaser than in a suit where the owner or those claiming under him are parties. *Re Morton and Lot No. 6 on Plan No. 589 in the County of York*, 7 O. R. 59.—Proudfoot.

A sale in 1880 of non-resident lands for taxes being impeached on the ground of no taxes being due, the original non-resident collector's rolls for 1877, 1878, and 1879, were produced, shewing amounts in arrear for each year respectively, which with interest amounted to the sum for which the land was sold. The due preparation of the warrant to sell, and advertising in the Official Gazette were also proved:—Held, sufficient proof of the taxes being due. *Fitzgerald et al. v. Wilson et al.*, 8 O. R. 559—Chy. D.

#### 2. Warrant to Sell.

It was objected that the warrant was not addressed to any one. It recited that the treasurer had submitted to the warden the land liable to be sold, and proceeded: "Now, I, the warden, command you," &c. This was given to the treasurer, was produced by him, and was acted on by him. The warrant purported to be drawn up pursuant to 32 Vict. c. 36, s. 128:—Held, that the warrant was sufficient. The court will not be punctilious in adhering to the letter of the statute where there is reasonable accuracy, and no possible prejudice resulting from literal inaccuracy in the frame of the warrant to sell. *Fitzgerald et al. v. Wilson et al.*, 8 O. R. 559—Chy. D.

#### 3. Objections Cured by Statute.

Certain lands, worth from \$600 to \$800, having been sold in November, 1881, for \$6.06 taxes, being one-eleventh in excess of taxes really due, the sale was on this ground set aside by Proudfoot, J., who held that R. S. O. c. 180, s. 155, did not cure the error, and that the maxim *de minimis non curat lex* did not apply; but, on an appeal to the Divisional Court, the judgment of Proudfoot, J., (9 O. R. 451,) was reversed. Per Boyd, C.—In *Yokham v. Hall*, 15 Chy. 335, the excess of statute labor tax was clearly illegal, and its imposition being unjustifiable vitiated the sale. There was no illegal excess of tax originally imposed upon the land in this case, and the owner must be regarded as being notified by the advertisement of sale of the error in carrying forward the amount, and having taken no steps to have it remedied, pending the period allowed for payment or redemption, he cannot



afterwards invoke its aid to annul the tax sale. Per Ferguson, J.—The difference of twenty cents and the calculation of interest and commission upon it must fall within the meaning of the words "error or miscalculation" mentioned in s. 150 of R. S. O. c. 180, and if so the provision is that the tax-deed shall not be invalid. *Yokham v. Hall*, 15 Chy. 335, considered and distinguished. *Claxton v. Shibley et al.*, 10 O. R. 295—Chy. D.

It was objected to the regularity of the sale that in 1881 neither the assessor nor the clerk returned the lands as occupied, as in fact they were, and further that the clerk did not examine the assessment roll when returned by the assessor as required by R. S. O. c. 180, s. 111: Semble, that these are matters of procedure only, and would be cured by sec. 155. *S. C. 9 O. R. 451*.—Proudfoot.

Quere, as to the effect of the curative provisions of sec. 156 of the Assessment Act, R. S. O. c. 180, since the decision of the Supreme Court, in *McKay v. Chrysler*, 3 S. C. R. 436, and whether a tax-deed may be questioned for irregularities in the assessment or in the proceedings prior to sale after the lapse of the two years. *Jeffery v. Howis*, 9 O. R. 364—C. P. D.

Held, following *Hutchinson v. Collier*, 27 C. P. 254, that the two years given by sec. 156 of R. S. O. c. 180, within which a tax-deed can be questioned, is to be computed from the giving of the deed and not from the time of the sale. The court, though not satisfied with the decision as arrived at in that case, considered they were bound by it. *Lytle v. Broddy*, 10 O. R. 550—C. P. D.

See *White v. Nelles*, 11 S. C. R. 587.

#### 4. Other Cases.

On 21st October, 1880, land was sold for taxes for the years 1877 and 1878, and on 15th November, 1881, a tax deed executed. The patent from the Crown issued in 1878. There was no evidence as to the right of the patentee of the land previous to the issuing of the patent, nor that the Crown Lands Commissioner had made any return to the treasurer of the land having been treated as a free grant, sold or agreed to be sold by the Crown, under sec. 106 of R. S. O. c. 180, so as to render it liable to be assessed prior to the year 1878:—Held, there not being any taxes proved to be in arrear for three years as required, the sale and tax deed were invalid. At the trial the plaintiff produced his patent. The defendant, in answer thereto, put in the tax deed:—Held, that the plaintiff by production of his patent made out a *prima facie* case, and the defendant, relying on his tax deed, was bound to prove the sale and arrears for three years, that is, that some portion thereof was in arrear for three years. *Stevenson v. Traynor*, 12 O. R. 804—C. P. D.

Owner's presence at sale held not to estop him from complaining of irregularities in sale. See *Claxton v. Shibley*, 9 O. R. 451.

Agreements between intending purchasers at sheriff's sale. See *Keefer v. Roaf et al.*, 8 O. R. 69.

#### V. MISCELLANEOUS CASES.

Mandamus to municipal corporation to levy sinking fund. See *Clarke v. The Municipality of the Town of Palmerston*, 6 O. R. 616.

Assessment for local improvements. See *Ba v. The City of Montreal*, 8 S. C. R. 252.

Invalidity of assessment for want of notice. *P*

Action to recover taxes paid under belief the assessment valid. *Ib.*

Action to have assessment quashed after payment of taxes under protest. See *Ex parte James D. Lewin*, 11 S. C. R. 484.

Right of provincial legislature to impose indirect tax. See *Attorney-General of Quebec v. Reed*, 10 App. Cas. 141.

#### ASSETS.

See EXECUTORS AND ADMINISTRATORS.

There can be no marshalling of assets in favour of a charity. *Becher v. Hoare et al.*, 8 O. R. 328.—Ferguson.

See *Bank of Toronto v. Hall*, 6 O. R. 653; *Purves v. Slater*, 11 O. R. 507.

#### ASSIGNEE.

See BANKRUPTCY AND INSOLVENCY.

#### ASSIGNMENT.

I. FOR THE BENEFIT OF CREDITORS—See BANKRUPTCY AND INSOLVENCY.

II. FRAUDULENT ASSIGNMENT—See FRAUDULENT CONVEYANCES.

III. OF GOODS AND CHATTELS—See BILLS OF SALE AND CHATTEL MORTGAGES.

IV. OF CHOSE IN ACTION—See CHOSE IN ACTION.

V. OF DOWER—See DOWER.

VI. OF JUDGMENTS—See JUDGMENT.—PRINCIPAL AND SURETY.

VII. OF LEASES—See LANDLORD AND TENANT.  
VIII. OF MORTGAGES—See MORTGAGE.

IX. OF PATENTS—See PATENT OF INVENTION.

Assignment of money in court—solicitor's lien. See *Yeman v. Johnston*, 11 P. R. 231.

#### ASSIZES.

See COURT OF ASSIZE.

#### ASSURANCE.

See INSURANCE.

#### ATTA

I. WHO MA

II. WHAT M

III. RESTITUT

IV. EXAMINA

I.

A judgment being, become a device of an attachment garnishee continuing, the judgment amount owing creditor, after or amount has been ceases to be a debt levied:—Held, that had obtained a debt due from the way Company to which railway w (defendants), was no any, holding a b n 27 Vict. c. 57, *Indian Pacific Ra* 321.—Ferguson.

II. WILIA

The defendant, Assembly, received on as an inducement his course in the to the Speaker of the House with the plaintiffs, judgment, issued an order from C. to the defendant money so handed to the defendant. ing, without expenits, directed an 73, O. J. Act, as to the form of the is by the registrar, no service upon the order, there was a from the garnishee appeal to the full *Stuart et al. v. Me*

McLeod contract use, for which he then the frame was as wholly enclosed work was all completed on or 84. McLeod weived the two sumeeted the building e, however, contiue, and until after ilding being still ok possession, an Son, having a juined and served an g summons on Ha th of March, 1884, ving the attaching ding to the term

## ATTACHMENT OF DEBTS.

- I. WHO MAY ATTACH, 25.
- II. WHAT MAY BE ATTACHED, 25.
- III. RESTITUTION OF MONEY PAID OVER, 26.
- IV. EXAMINATION OF JUDGMENT DEBTOR, 27.

## I. WHO MAY ATTACH.

A judgment creditor does not, properly speaking, become a creditor of the garnishee by service of an attaching order upon the latter. The garnishee continues to be debtor to his own creditor, the judgment debtor, until he has paid the amount owing into court, or to the attaching creditor, after order so to pay, or a levy of the amount has been made of his property, when he ceases to be a debtor as to the amount paid or levied.—Held, therefore, that the plaintiff, who had obtained a garnishee order, garnishing a debt due from the Brockville and Ottawa Railway Company to W. S., his judgment debtor (which railway was now represented by the defendants), was not a "creditor" of the said company, holding a *bona fide* claim against it within 27 Vict. c. 57, s. 10. *Wardrop v. The Canadian Pacific Railway Company et al.*, 7 O. R. 21.—Ferguson.

## II. WHAT MAY BE ATTACHED.

The defendant, a member of the Legislative Assembly, received a sum of money from a person as an inducement or bribe to influence him in his course in the assembly, which he handed to the Speaker of the Assembly to wait the action of the House with regard to the alleged bribery. The plaintiffs, judgment creditors of the defendant, issued an order attaching all debts due from C. to the defendants, claiming that the money so handed to him became a debt payable to the defendant. The court, Galt, J., dissenting, without expressing any opinion on the merits, directed an issue to be tried, under Rule 73, O. J. Act, as to the garnishee's indebtedness. The form of the issue was subsequently settled by the registrar, namely whether at the date of the service upon the garnishee of the attaching order, there was any debt due or accruing due from the garnishee to the defendant, which on appeal to the full court was held sufficient. *Ward v. McKim*, 8 O. R. 739.—C. P. D.

McLeod contracted with Hawkins to erect a house, for which he was to receive \$1,225; \$300 when the frame was up, \$300 when the building was wholly enclosed, and the balance when the work was all completed. The building was to be completed on or before the 3rd of February, 1884. McLeod went on with the work and received the two sums of \$300, but he had not completed the building on the 3rd of February, 1884. He, however, continued the work till after that time, and until after the 1st of April, when the building being still unfinished, Hawkins entered, took possession, and completed it. McCraney (son, having a judgment against McLeod, obtained and served an attaching order and garnishing summons on Hawkins, the garnishee, on the 14th of March, 1884:—Held, that at the time of serving the attaching order no debt existed according to the terms of the contract, and no pro-

mise to pay had arisen by implication, and therefore there was nothing upon which the attaching order could operate. *McCraney et al. v. McLeod et al.*, 10 P. R. 539.—Dalton, Master—Rose.

By the judgment in this action the defendant was found to owe the plaintiff \$115, and he was ordered to pay the plaintiff's costs of action, less some interlocutory costs awarded to the defendant. Subsequent to judgment certain creditors of the plaintiff issued garnishment process from a Division Court, attaching all debts due from defendant to plaintiff. After the taxation of the plaintiff's costs, but before the taxation of the defendant's interlocutory costs, the defendant paid \$115 into the Division Court, having previously paid another sum of \$115 to the sheriff to procure his release from arrest under a *caapias* after judgment in this action:—Held, that the costs coming to the plaintiff constituted an attachable debt before taxation, which was bound by the service of the garnishment process, and properly payable into the Division Court after it was ascertained by taxation; and the defendant could not object that his set-off was not ascertained at the time of payment into court, as it was by his own default; and therefore the money paid into court pursuant to the attachment was to be taken to be part of the money due to the plaintiff for costs, and not as representing the same debt as the money paid to the sheriff. *Macpherson v. Tisdale*, 11 P. R. 261.—Boyd.

E. A. conveyed real and personal estate to one B. upon trust, to convert the same into money, and pay debts, &c., and as to any balance remaining, upon trust to pay the same to R. A., son of E. A., or if B. should see fit he might invest the same in the purchase of a homestead, and convey the same to R. A. in fee:—Held, reversing the judgment of the County Court, that there was no debt due from B. to R. A. which could be garnished by the creditors of R. A. *McKindsey v. Armstrong*, 10 A. R. 17.

Debts owing to the defendant from persons living in Ontario are "assets in Ontario which may be rendered liable to the judgment," within the meaning of Rule 45 (e), O. J. Act. *Purves v. Slater*, 11 P. R. 507.—Rose.

Held, reversing the judgment of the court below, that under the garnishee clauses of the C. L. P. Act of Prince Edward Island transcripts of ss. 60 and 67 of the English C. L. P. Act, 1854, an overdue promissory note in the hands of the payee is liable to be attached by a judgment creditor, and that payment of the amount by the garnishee to the judgment creditor of the payee, in pursuance of a judge's order, is a valid discharge. *Roblee v. Rankin*, 11 S. C. R. 137.

## III. RESTITUTION OF MONEY PAID OVER.

An appeal from the order of a county judge directing payment over to the plaintiff by a garnishee of moneys in his hands was allowed by the court in a former judgment (10 A. R. 17.) It appeared that the garnishee had paid over the moneys in his hands before the appeal was initiated:—Held, that the certificate of the former judgment properly contained an award of restitution of the money so paid, which the court had authority to make under 45 Vict. c. 6, O. *McKindsey v. Armstrong*, 11 P. R. 200.—C. of A.

## IV. EXAMINATION OF JUDGMENT DEBTOR.

A satisfactory answer, upon examination as a judgment debtor, according to the statute R. S. O. c. 50, s. 305, means more than that the answer shall be a full, appropriate, and pertinent answer to the question: it means that the answer shall shew a satisfactory disposition of the property. *Crooks v. Stroud*, 10 P. R. 131.—Wilson.

The defendant in his examination said he had no real estate nor any personal estate. In the fall of 1882 he had about \$300 in money; he paid his bills with it, and lost the balance at the horse races at Buffalo. Since the fall of 1882 he has been in his father's employ; he gets nothing but his board and clothing. When asked as to the conveyance of the tannery lot to his father, which he held in trust for him, he said: "I could not say what the consideration was, or whether I was paid anything or not; I forget; I can't think of it, I forget whether I received any money for that then or since; it was before judgment." \* \* My father wanted me to get it fixed":—Held, that the defendant, in his examination, had disclosed his property and his transactions respecting the same; and had not concealed or made away with his property in order to defeat or defraud his creditors. *Ib.*

It is, however, that the defendant had not fully or truthfully with respect to the receipt of receiving or not receiving money or other consideration; and that the answers he had given respecting his transactions with his property were not satisfactory by reason of the illegal and wrongful disposition of it by gambling or horse-racing and otherwise. *Ib.*

Defendant was allowed to appear for further examination, and ordered to pay the costs of the first examination and this application forthwith. *Ib.*

## ATTACHMENT OF THE GOODS OF DEBTORS.

See ABSCONDING DEBTOR.

## ATTACHMENT OF THE PERSON.

FOR CONTEMPT OF PROCESS OR ORDER OF THE COURT.

Attachment against the president of a company for disobedience of a writ of mandamus was refused because it appeared that he could not, by himself and without a majority of the board of directors, perform the act required by the writ and the other directors had not been served. *Demorest v. Midland Railway Company*, 10 P. R. 82.—Wilson.

Attachment not sequestration is the proper remedy for disobeying a mandamus. *Ib.*

G. O. Chy. 201 and 296 are still in force in the Chancery Division. Upon a motion to commit the defendant (an administrator) for neglecting to bring in his accounts before a day named pursuant to the direction of the Master:—Held, that

personal service upon the defendant of the Master's direction and of the notice of motion to commit was not necessary. *Re Harnden, Harnden v. Harnden*, 11 P. R. 35.—Boyd.

Against sheriff for disobedience of interpleader order. See *Maclean v. Anthony*; *Slater v. Anthony*, 6 O. R. 330.

For disobedience of injunction. See *Grassie v. Carter*, 6 O. R. 584.

A judge of a County Court, acting under the authority of 48 Vict. c. 26, s. 6 (Ont.), removed an assignee for creditors and substituted another assignee. The first assignee, as alleged, refused to deliver over the keys of the place of business of the insolvent to the second assignee, and the judge made an order for the issue of a writ of attachment against the first assignee for contempt.—Held, that the judge, in acting under the statute, was not exercising the powers of the County Court, but an independent statutory jurisdiction as persona designata, and had therefore no power to direct the issue of a writ of attachment; and prohibition was ordered. *Re Paquette*, 11 P. R. 463.—Wilson.

## ATTORNEY.

See ATTORNEY-GENERAL.—SOLICITOR.

## ATTORNEY-GENERAL.

Semble, that on an application to question a patent under the Patent Act of 1872, the intervention of the attorney-general is not essential. *In re The Bell Telephone Company*, 9 O. R. 339.—C. F. D.

The questions in this case relating to the Fire Insurance Company Acts, so far as raised, were held not to be of such a constitutional character as to require notice to the attorney-general of the province, or the minister of justice of the dominion. *Goring v. The London Mutual Fire Insurance Co.*, 11 O. R. 82.—O'Connor.

The attorney-general ordered to be made a party to a case involving the title to a roadway in order to give protection to the Dominion Government in expropriating the land. See *Re Trent Valley Canal "Re Water Street" and "The Road to the Wharf"*, 11 O. R. 687.

## ATTORNTMENT.

Effect of attornment. See *Mulholland v. Harman et al.*, 6 O. R. 546.

## AUCTION.

Compensation in case of mistake as to quantity of land sold. See *Cottingham v. Cottingham*, 11 A. R. 624.

Contract not signed by the vendor, but subsequently admitted by letters. See *O'Donohue v. Stammers*, 11 S. C. R. 358.

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## AWARD.

See ARBITRATION AND AWARD.

## BAGGAGE.

Liability of railway company for loss of. See *Vineberg v. Grand Trunk Railway Co.*, 13 A. R. 93.

## BAIL.

A judge's order to hold to bail in the sum of \$300, was obtained in an action of tort, in which the plaintiff swore to a cause of action for \$500. The bail piece was in the usual form, stating: "Bail for \$300 by order of," &c. The recognizance of bail was in the words of the statute, namely: "You," the bail "do jointly and severally undertake that if the defendant in the original action shall be condemned, then he shall pay the costs and condemnation money, or render himself to the custody of the sheriff," &c., "or you will do so for him." Rule 89 of T. T. 1856, provides that "the bail shall only be liable for the sum sworn to by the affidavit of debt and costs of suit, not exceeding in the whole the amount of their recognizance." In the original action a verdict was obtained against the defendant for \$400, and \$125.27 costs. In an action on the recognizance against the bail:—Held, Cameron, C. J., dissenting, that the undertaking in the recognizance to pay the condemnation money, read in connection with Rule 89, meant the amount mentioned in the Judge's order; and therefore the bail in this action were only liable for the \$300 the amount mentioned in the Judge's order, and the costs of the original and of this action. The reasonableness of having the recognizance express its meaning in simple language, instead of adhering to a form of words adapted to meet a different practice, suggested. *Baker v. Jackson et al.*, 9 O. R. 661—C. P. D.

The plaintiffs issued a writ of capias, irregular and contradictory in its provisions. It purported to be issued in a pending action in which judgment had been recovered, and claimed the amount of the judgment and further costs. It required the defendant to put in special bail, which by its recognizance meant an undertaking by sureties to pay the condemnation money, in which the defendant "shall be condemned in this action." The claim indorsed upon the writ and the requirement as to special bail were alone applicable to a pending action on the judgment. The bail the sheriff undertook that special bail would be put in, and special bail was put in:—Held, that the defendant and his sureties had, by putting in special bail, treated the writ as one issued in an action on the judgment, and had placed the defendant in the same position as if he had appeared in such action, and a statement of claim delivered after such an appearance was therefore regular:—Semble, section 34 of the C. L. P. Act, (R. S. O. c. 50, sec. 39,) has not been repealed by rule 5, O. J. Act. *Cochrane Manufacturing Company v. Lamon*, 11 P. R. 162.—See—Q. B. D.

Held, reversing the judgment of the County Court, that proceedings to fix bail cannot be maintained on a writ of ca. sa. which is made re-

turnable immediately after the execution thereof. For such purpose it is necessary that the writ should be returnable on a day certain. (Hagarty, C. J. O., dissenting.) *Proctor v. Mackenzie et al.*, 11 A. R. 486.

## BAILMENT.

The plaintiff had been for sometime a guest of the defendant, an inn-keeper, and on leaving the inn, after paying his bill, was allowed to leave a box containing some papers and books alleged to be of value to the plaintiff, in the room of the inn used for storing baggage, &c., the plaintiff intended to take it away the day following, but owing to illness he did not call for it for several weeks afterwards, when it was discovered that the box was lost, there was no other evidence of any negligence in the matter:—Held, reversing the judgment of the County Court, that the plaintiff could not recover. *Palin v. Reid*, 10 A. R. 63.

See *Dominion Bank v. Davidson et al.*, 12 A. R. 90, p. 57. See also, *Brassert v. McEwen et al.*, 10 O. R. 179.

## BAILIFF.

See DIVISION COURTS.

## BALLOTS.

See PARLIAMENTARY ELECTIONS.

## BANKRUPTCY AND INSOLVENCY.

## I. ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

1. *Deed.*
  - (a) *Execution of*, 31.
  - (b) *Other Cases*, 31.
2. *Notice of Claims*, 32.
3. *Proof of Claim*, 32.
4. *Partnership and Separate Creditors*, 33.
5. *Assignee*, 34.
6. *Dividend*, 34.
7. *Other Cases*, 35.
8. *Preferential and Fraudulent Assignments*—See FRAUDULENT CONVEYANCES.

## II. INSOLVENT ACT, 1875.

1. *Assignee*, 36.
2. *Valuing Security*, 36.
3. *Fraud and Fraudulent Preferences*, 37.
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## VI. WHEN INSOLVENT ORDERED TO GIVE SECURITY OF COSTS.—See COSTS.

### 1. ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

#### 1. Deed.

##### a) Execution of.

Held reversing the decision of *Ferguson, J.*, 9 O. R. 314, (*Burton, J. A.*, dissenting), that the directors of an incorporated trading company had power to authorize the execution of an assignment for the benefit of creditors of the company, and that the defendants, execution creditors, as strangers to the company could not object that the authority of the shareholders was not given or that they had not ratified the deed: *Donly v. Holmwood*, 4 A. R. 555, distinguished. Per *Burton, J. A.*, that the directors could not do so without the sanction of the shareholders. *Whitting et al. v. Hovey et al.*, 13 A. R. 7. Affirmed by Supreme Court, not yet reported.

##### (b) Other Cases.

The assignment was executed by one of the partners for a co-partner under verbal instructions from the co-partner before leaving for England to sign for him, if an assignment became necessary; and also under a cablegram received from him while in England, to the same intent:—Held, that though authority to execute a deed must be by deed, this would not affect goods of which the assignee took actual possession namely, the stock-in-trade in the assignee's store; nor to goods warehoused for and held by a bank, where the bank were notified and agreed to hold the surplus, after paying the bank's claim, for the assignee, which was equivalent to taking possession, and which were the only goods in question here:—Held, also, that the omission of some part of the assignor's estate from the assignment or the postponing the making of the assignment until certain favoured creditors had obtained judgment and execution, did not invalidate it. *Nelles v. Malby et al.*, 5 O. R. 263—C. P. D.

An assignment in trust for creditors, amongst other things, authorized the trustee to sell for cash or on credit, and if on credit, with or without security for the balance of purchase money remaining unpaid, and also to pay in full any debts which constituted a lien on the assets where deemed advisable in the interests of the trust:—Held, affirming the judgment of the court below (2 O. R. 525) that the introduction into the trust deed of power to sell on credit, which was so given in good faith, did not invalidate the assignment:—Held, also that the discretion vested in the trustee to pay such liens in full did not invalidate the deed. *O'Brien et al. v. Clarkson*, 10 A. R. 603.

By a deed of assignment for the benefit of creditors the trust was declared to be "to sell and dispose of such portions of the said estate as shall be readily saleable either for cash or credit, or under the power hereinafter contained to carry on the said business. \* \* and to stand possessed of the said moneys, &c., and all profits and increase arising therefrom, in trust to pay," &c., and a subsequent part of the deed provided that the assignee "shall have power to employ the said party of the first part (the insolvent) or

any other person in winding-up the affairs of the said trust estate, in collecting and getting in his estate and effects hereby assigned, and in carrying on his said trade:—Held, affirming the judgment of the County Court, *Hagarty, C. J.*, O., dissenting, that the provisions above set forth did not invalidate the deed. *Jennings v. Moss et al.*, 10 A. R. 696.

Accidental omission of claim from schedule of debts. See *McLean v. Garland*, 10 A. R. 405. But see *Cassell's Digest*, p. 177.

### 2. Notice of Claims.

H. A. B., being unable to pay his creditors in full, made an assignment to E. F. B. for their benefit. E. F. B. advertised in the *Ontario Gazette* and a local paper, under R. S. O. c. 107, as amended by 46 Vict. c. 9, (Ont.) for all creditors to send in their claims and by his clerk C. E. B. sent notices to each creditor from a list furnished by the assignor to said C. E. B., which list he said must have contained the names of the plaintiffs and C. & Co., who had assigned a claim they had to the plaintiffs. No claim was sent under the notice by either the plaintiffs or C. & Co., and the defendant distributed the estate without regard to the plaintiffs or C. & Co. At the trial it appeared that E. F. B. had H. A. B.'s books, in which there was a credit to the plaintiffs and C. & Co.; that H. A. B. told him before he divided the estate that C. & Co. had sued him, and on the day of the division he received a letter from plaintiffs' solicitor notifying him. No proof was given of the posting of the individual notices to either plaintiffs or C. & Co.:—Held, that the defendant had notice of the plaintiffs' claim, and that he was liable to the plaintiffs for their and C. & Co.'s proper dividend on the estate. A trustee is not exonerated by the Act if he had actual notice of the claim before distribution, even though he may have sent the notice prescribed, and received no response to it. *Thurston v. Curling Brewing and Malting Company v. Blue*, 6 O. R. Chy. D. 441.—*Ferguson*.

### 3. Proof of Claims.

F. agreed with the Bank of Montreal for a line of credit to be secured by the discounting certain bills and notes which he had himself discounted, and which he indorsed and delivered to the bank. He also arranged with the Merchant Bank to discount his own notes to be secured by the deposit of his customers notes as collateral. F. then failed, being largely indebted to both banks, and made an assignment for the general benefit of his creditors. In proving their claims on his estate before the assignee, the banks contended that they were only bound to give credit on the amount of their claims for sums received on the collateral securities up to the date of the assignment. In an action by another creditor entitled to share under the assignment, against the banks and the assignee. It was:—Held, following *Rhodes v. Moxhay*, 10 W. R. 103, that a creditor is entitled to prove for the whole amount of his debt, and to take a dividend upon the whole without prejudice to his rights against securities he may hold, subject to the qualification that he must not ultimately receive more than 20s. on the £. The state of the accounts, at the

time the claim was made, was the basis of the dividend to be fixed by the assignee. The moneys received to be credited; such sources need not be credited, unless they, with amount received, would make the sum equal to the debt. That in the same position, the line of credit to be real, and as long as the bank could pay, the bank could pay the original notes discounted. *Eastman v. The Bank of Montreal*, 79.—*Boyd*.

### 4. Partnership.

Under an assignment for the benefit of creditors, the assignee was to distribute the proceeds of the estate in proportion to the claims of the assignors in payment of their just claims, and as long as possible of their just claims, and distributing the same according to law:—Held, that it proved the partnership and that the partnership was dissolved according to the law. *Nelles v. Malby et al.*, 5 O. R. 263—C. P. D.

E. & J. being in partnership, E. divided his assets, and J. M., an individual, took the benefit of all his estate. E. assigned for the benefit of his creditors, and J. M., after he had obtained judgment against E. in the assignment, dissolved and divided his separate estate, and assigned for the benefit of his creditors until his individual estate was exhausted. It must be set aside as a preference to the Statute of Assignments as to registered assignments. *Watts*, 6 O. R. 238.

On the dissolution of W., the latter was a partner in partnership to L., and assigned for the benefit of his creditors. L. was a partner in partnership, to the exclusion of W., and without recognizing such liens, as was the law directed by the assignment of Proudfoot. Under the terms of the partnership, the joint creditors of L. and W. were entitled to be paid. *Bostwick*, 11 A. R.

time the claim is put in, is that which forms the basis of the dividend sheet, and the amount is to be fixed by the assignee, as at that date. Any moneys received prior to that from collaterals are to be credited; those received afterwards from such sources need not to be taken into account, unless they, with the dividend, bring up the amount received by the creditor to 100 cts. on the \$.

That substantially both banks were in the same position as to the securities in their hands. That there was a distinct contract for a line of credit to the debtor by the Bank of Montreal, and as long as that line was not exceeded, the bank could prove on the footing of that contract as the original debt, and hold the customer's notes discounted in pursuance of it as securities.

*Lastman v. The Bank of Montreal et al.*, 10 O. R. 79.—Boyd.

#### 4. Partnership and Separate Creditors.

Under an assignment by a firm in trust for creditors, the assignee was directed to distribute the proceeds of the property assigned "ratably and proportionably among all the creditors of the assignors in payment and satisfaction as far as possible of their just debts, having due regard to the rights of partnership and private creditors, and distributing the same as between them according to law?"—Held, that the assignment was valid, that it provided for the payment, both of the partnership and separate creditors, out of their respective estates appointed for that purpose according to law, the meaning of which is well known. *Nelles v. Maltby et al.*, 5 O. R. 363.—C. P. D.

E. & J. being in partnership, dissolved and divided their assets. Subsequently E. being sued by M., an individual creditor, made an assignment of all his estate, real and personal, for the benefit of his creditors, and by the terms of the assignment, placed his partnership and individual creditors on the same footing. In an action by M. (after he had obtained judgment) to set aside the assignment. It was:—Held, that after the dissolution and division of assets, E.'s share became his separate property, and could not be assigned for the benefit of his partnership creditors until his individual debts were first paid, and that the assignment as to personality was bad and must be set aside, but that a debtor may give a preference to one creditor over another under the Statute of Elizabeth, and that the assignment as to realty was good. *Martin v. Jones*, 6 O. R. 238.—Boyd.

On the dissolution of a partnership between L. and W., the latter transferred all his interest in the partnership to L., who subsequently became solvent and assigned all his estate, including that part of it which had formerly been assets of the partnership, to the defendant, in trust to pay the claims of his creditors ratably and proportionately, and without preference or priority, recognizing such liens, claims, charges, and priorities as the law directs?"—Held, reversing the judgment of Proudfoot, J., 5 O. R. 104, that under the terms of the deed there was no priority between the separate creditors of L. and the joint creditors of L. and W., all being creditors of L., and that both classes of creditors were entitled to be paid *pari passu*. *Moorehouse v. Bostwick*, 11 A. R. 76.

See also *Bank of Toronto v. Hall*, 6 O. R. 653,

#### 5. Assignee.

The duties of an assignee under such an instrument as the one in question in this case are analogous to those of executors and trustees administering estates, and the court will consider that a year is a proper time within which the sale of the property assigned is to be made, where the assignment leaves the time and manner of such sale in the discretion of the assignee. If the sale be not made within a year the onus will be cast on the assignee of satisfying the court of his *bona fides* in seeking further delay. *Ontario Bank v. Lamont et al.*, 6 O. R. 147.—Boyd.

The defendant, who was assignee for creditors of the mortgagor, was threatening to remove certain of the property comprised in the mortgage, acting, as he said, for the benefit of the creditors. The plaintiffs claimed an injunction to restrain him. In his defence he alleged that he was a creditor of the mortgagor at the time of the execution of the mortgage in question, and that after the commencement of this suit he recovered a judgment for the amount of his debt, and he claimed a right to the property taken by him as against the plaintiffs as such creditor:—Held, that he was entitled thus to avail himself of his position as a creditor at the date of the mortgage, notwithstanding the fact that in removing the goods he alleged that he had acted for the benefit of the creditors, and although he did not recover his judgment and execution before the commencement of the suit. *Robinson et al. v. Cook*, 6 O. R. 590.—Ferguson.

An assignee for the benefit of creditors takes only such title as his assignor had to the property. *Id.*

In the absence of a statutory title to sue as representing creditors, such as is conferred by bankruptcy and insolvency statutes, an assignee in trust for creditors can only enforce the same rights as the person making the assignment to him could have enforced; therefore the defendant could not, by a plea in his own name, ask to have a conveyance, made by the debtor to the plaintiff prior to the assignment under which defendant claimed, rescinded or set aside as fraudulent against creditors. The nullity of a deed should not be pronounced without putting all the parties to it en cause en declaration de jugement commun:—Semble, that plaintiff, being a second purchaser in good faith and for value, acquired a valid title to the property in question which he could set up even against an action brought directly by the creditors. *Burland v. Moffat*, 11 S. C. R. 76.

[See 48 Vict. c. 26 (Ont.)]

#### 6. Dividend.

Where C., an insolvent, had assigned all his assets and stock in trade to S., as trustee for creditors, and the plaintiff claimed a specific lien on the same to the extent of certain trust moneys, which had come into C.'s hands, as trustee and executor for the plaintiff, under the will of his (the plaintiff's) father, but had been wrongfully converted by C. to his own use, and employed in





filed shows a balance over security of \$3,091.13, but Mr. Leitch (the purchaser of the estate) disputes your claim to any dividend, on the ground," &c. it was:—Held, that the assignee had signified his election to allow the creditor to retain the security, and his abandonment of any right to redeem it for the estate. *16.*

### 3. Fraud and Fraudulent Preferences.

W., the respondent, was a private banker who had had various dealings with one D., and had discounted for him at an exorbitant rate of interest notes received by D. in the course of his business. D.'s indebtedness on new transactions amounted to a large sum of money, but, being a man of very s. genuine temperament, he had entered into a new line of business, after obtaining goods on credit to the amount of \$4,000 or \$5,000, upon a representation to the parties supplying such goods that, although without any available capital, he had experience in business. About twelve days after he had commenced his new business, being threatened by a mortgagee with foreclosure proceedings, he applied to W., who advanced him \$300, part of which was applied in paying the overdue interest on the mortgage, and the surplus in retiring a note of D.'s held by W. D. executed a mortgage in favour of W. and was granted a reduced rate of interest on his indebtedness, and was told he would have to work carefully to get through. D. became insolvent about four months afterwards. In a suit by McR., as assignee, impeaching the mortgage to W., it was:—Held, affirming the judgment of the Court of Appeal, that McR. had not satisfied the onus which was cast upon him by the Insolvent Act, of showing that the insolvent at the time of the execution of the mortgage in question contemplated that his embarrassment must of necessity terminate in insolvency. *McRae v. White*, 9 S. C. R. 22.

G., in 1878, being unable, on account of depression in business, to meet his liabilities, applied to his creditors for an extension of time for the payment of their claims, showing a surplus of \$6,000, after deduction of his bad debts. The creditors consented to grant his request, and agreed to accept G.'s notes at 4, 8, 12 and 16 months, on condition that the last of them should be endorsed to their satisfaction. N. (the respondent) agreeing to endorse the last notes on condition that G. should deposit in a bank in his (N.'s) name \$75 per week to secure him for such endorsement, and G. signed an agreement to that effect. Thereupon N. endorsed G.'s notes to an amount of over \$4,000, and they were given to G.'s creditors. On 31st July, 1879, G., after having deposited \$2,007.87 in N.'s name, in the Ville Marie Bank, failed, and N. paid the notes he had endorsed, partly with the \$2,007.87. B., as assignee of G., brought an action against N., claiming that the payments made to N. by G. were fraudulent, and praying that the money so deposited might be reimbursed by N. to B., for the benefit of all G.'s creditors:—Held, affirming the judgment of the Court of Queen's Bench, (Que.) Ritchie, C. J., and Fournier, J., dissenting, that the arrangement between G. and N., by which the moneys deposited in the bank by G. became pledged to N., was not void either under the Insolvent Act or the Civil Code; there was no fraud on the creditors, nor such an abstrac-

tion of assets from creditors as the law forbids, but a proper and legitimate appropriation of a portion of G.'s assets in furtherance and not in contravention of the rights of the creditors, giving at the most to the surety a preferential security which could not be said to have been in contemplation of insolvency or an unjust preference. *Bransford v. Normand*, 9 S. C. R. 711.

F., a shipowner in Yarmouth, N. S., employed as his agents in Liverpool J. & Co., the defendant J. being a member of their firm, and as agents in New York he employed the firm of S. & B., of which the defendant S. was a member. In the course of his dealings with these agents he became indebted to both firms for acceptance by them of his drafts, made when he was in want of money, towards the payment of which they received the freights of his vessel and remittances in money. On one occasion he said that he would give to the Liverpool firm a mortgage on the "Tsernogora" or "Magnolia" when they should require it, and in a subsequent conversation with a member of the firm he agreed to give such mortgage on certain conditions which were not carried out. He also promised the firm in New York to give them security in case anything happened, and mentioned as such security a mortgage on the "Tsernogora." According to F.'s own statement he had sufficient property to pay his liabilities when these conversations took place. A few weeks after these conversations took place, F. executed a mortgage of  $\frac{2}{3}$  shares of the "Tsernogora" in favour of the defendants J. and S. and had the same recorded, and within thirty days thereafter a writ of attachment in insolvency was issued against him. The plaintiff, who was appointed assignee of F.'s estate by his creditors, filed a bill to have the mortgage set aside, claiming that it was void under sec. 133 of the Insolvent Act of 1875. The defendant J. did not answer the plaintiff's bill, and the other defendants denied that the mortgage was made in contemplation of insolvency, and also claimed that as it was made under the provisions of the Merchants' Shipping Act, (Imp.) it was not affected by the Insolvent Act of 1875. The judge in equity, before whom the cause was heard, made a decree in favour of the plaintiff and ordered the mortgage to be set aside, and the Supreme Court of Nova Scotia dismissed an appeal from that judgment. On appeal to the Supreme Court of Canada:—Held, affirming the judgment of the court below, (Henry, J., dissenting,) that the promise to give security "in case anything should happen" could only mean "in case the party should go into insolvency," and that the transfer was void under sec. 133 of the Insolvent Act of 1875:—Held, also, that the provisions of the Merchants' Shipping Act did not prevent the property in the ship passing to the assignee under the Insolvent Act. *Jones v. Kinney*, 11 S. C. R. 708.

### 4. Fraud in obtaining Goods or Credit.

P. et al., merchants carrying on business in England, brought an action for \$4,000 on the common counts against J. S. et al., and in order to bring S. et al. within the purview of sec. 136 of the Insolvent Act of 1875, by a special count alleged in their declaration that a purchase of goods was made by S. et al. from them on the



13th March, 1879, and another purchase on the 29th March of the same year; that when S. et al. made the said purchases they had probable cause for believing themselves to be unable to meet their engagements and concealed the fact from P. et al., thereby becoming their creditors with intent to defraud P. et al. J. S. (appellant) amongst other pleas, pleaded that the contract out of which the alleged cause of action arose was made in England and not in Canada. To this plea P. et al. demurred. It was agreed that the pleadings were to be treated as amended by alleging that the defendants were traders and British subjects resident and domiciled in Canada at the time of the purchase of the goods in question and had subsequently become insolvents under the Insolvent Act of 1875, and amendments thereto. Per Ritchie, C.J., and Fournier, J.: 1. That sec. 136 of the Insolvent Act of 1875 is intra vires of the Parliament of Canada. 2. That the charge of fraud in the present suit is merely a proceeding to enforce payment of a debt under a law relating to bankruptcy and insolvency over which subject matter the Parliament of Canada has power to legislate. 3. Although the fraudulent act charged was committed in another country beyond the territorial jurisdiction of the courts in Canada, the defendant was not exempt for that reason from liability under the provisions of the 136th sec. of the Insolvent Act, 1875, and therefore the plea demurred to was bad and the appeal should be dismissed. Per Gwynne, J., the demurrer does not raise the question whether the sec. 136 of the Insolvent Act of 1875 is or is not ultra vires of the dominion parliament, for whether it be or not, the plea demurred to is bad, inasmuch as it confesses the debt for which the action is brought, and that such debt was incurred under circumstances of fraud, and offers no matter whatever of avoidance or in bar of the action; therefore, if the appeal be entertained it must be dismissed. Per Strong, Henry, and Taschereau, JJ., there being nothing either in the language or object of the 136th sec. of the Insolvent Act to warrant the implication that it was to have any effect out of Canada, it must be held not to extend to the purchase of goods in England by defendant, stated in the second count of the declaration. In this view, it is unnecessary to decide as to the constitutional validity of the enactment in question, and the appeal should be allowed. The court being equally divided, the appeal was dismissed, without costs. *Shields v. Peak*, 8 S. C. R. 579.

### 5. Other Cases.

In ejectment plaintiff claimed title under a deed from the assignee in insolvency of P. D. Prior to the issue of the writ of attachment in insolvency P. D. had conveyed the property to his brother L. D. Two of the creditors claimed that the deed was fraudulent, and made a demand under sec. 68 of the Insolvent Act of 1875 on the assignee to take proceedings to have the deed set aside, which the assignee, on instructions from the creditors, refused to do, whereupon the two creditors obtained from the judge an order under that section authorizing them to take the proceedings on their own behalf. Proceedings were thereupon taken and the deed set aside. The land was advertised, the period there-

for being shortened by the judge, and was sold to F., but in reality to the plaintiff to whom F. conveyed. The assignee was notified of the sale and requested to execute a conveyance to the purchaser which, under instructions from the creditors he refused to do, whereupon an order was obtained from the judge directing the assignee to execute the deed, the assignee's solicitor attending and opposing the making of the order. Under sec. 68 the "benefit derived from such proceedings shall belong exclusively to the creditor instituting the same for his benefit;" and under sec. 75, no sale is to be completed unless it "has been sanctioned by the creditors at their first meeting, or at any subsequent meeting called for the purpose or by the inspectors;" and also the period of the advertisement might be shortened "by the creditors with the approval of the judge."—Held, Rose, J. "contending, that the sale and the deed thereon was valid. Per Galt, J.—The effect of sec. 68 was to withdraw the property from the general body of creditors, and to vest it in the litigating creditors; and, so far as regards proceeding under this section, creditors when referred to in the statute meant litigating creditors, and not the general body of creditors; and the sale having been sanctioned by such litigating creditors, sec. 78 had been complied with. Per Cameron, C.J.—Under sec. 68 the benefit to accrue from the proceeding passed from the estate to the litigating creditors; and the sanction of all the creditors referred to in sec. 78 was not requisite; but even if it were, the defendant, a mere stranger to the insolvency proceedings, was not in a position to raise the objection. Per Cameron, C.J., also.—An assignee under the Insolvent Act 1875, is not merely the executor of a power, but takes the legal estate which on conveyance by him vests in his grantee clothed with the trusts by which it was invested in the assignee. Per Galt, J.—The meaning of sec. 68 was not that litigating creditors were to have the exclusive benefit of the proceeding without limitation, but merely the benefit thereof as creditors, that is, payment of their debts in full; but any surplus must go to the other creditors; that on the deed to L. D. being set aside the property did not vest in the litigating creditors, but was in the assignee who held it in trust to so distribute it, and this being a matter for the general benefit of the creditors it was subject to the other provisions of the Act, and therefore to the provisions of sec. 78, which had not been complied with, so that no sale was made, and no title passed thereunder. Per Jarvis v. Cooke, 29 Chy. 303, considered and commented on. The defendant set up that he had a title by possession; and that the title was outstanding in a mortgagee; but the evidence failed to establish it. *Donovan v. Herbert*, 9 O. R. 89.—C. P. D.

Held, affirming the above decision, that the sale was not one subject to the control of the general body of creditors, and therefore that the restrictions of sec. 75 of the Act were inapplicable, and the sale was valid.—Held, also, that the defendant failed to establish his claim of title by possession. *S. C.*, 12 A. R. 298.

Held, affirming the judgment of the Chancery Division (1 O. R. 167) *Sprague, C.J.O.*, diss: That an assignment under the Insolvent Act 1875, by an insolvent mortgagor does not stop the running

of the Statute the claim of *Court v. Wals*

### III.

A creditor w after the exec assented to in assignee in wh topped from al the assignment Osler.

As to effect after assignme See *In re Music* 8 O. R. 225.

Construction rupt" in a by-l Exchange, 8 O.

Priority of th payment of mor become insolven *Scutia*, H. S. C.

See also *Agol*

### I. CHEQUES,

### II. DEPOSITS,

### III. TAKING C

#### 1. General

#### 2. Warehouse

#### ING A

### VI. MISCELLAN

### V. WINDING-

The plaintiffs w cheque drawn by of Montreal, at appeared the wor treal, Toronto, at posited by the pla their bank at T., a ness was sent by t treal at T., and by to the former. I where it was disho charged back by plaintiffs' bank, and plaintiffs. It ap were habitually u their cheques wit Montreal:—Held, words was, that t would make no ch and that they did being funds to mee the right to charge were no funds. *Ti pany v. The Bank* 544.

See *Griene v. Th* p. 44.

of the Statute of Limitations so as to keep alive the claim of the mortgagee against the land. *Court v. Walsh*, 9 A. R. 294.

### III. MISCELLANEOUS CASES.

A creditor who attended a meeting of creditors after the execution of a deed of assignment, and assented to be appointed a trustee to aid the assignee in winding up the estate was—Held estopped from afterwards denying the validity of the assignment. *Gardner v. Kheopfer*, 7 O. R. 603—Osler.

As to effect of extinguishment of mortgage after assignment in insolvency by mortgagor. See *In re Music Hall Block—Dumble v. McIntosh*, 8 O. R. 225.

Construction of words "insolvent and bankrupt" in a by-law. See *Temple v. Toronto Stock Exchange*, 8 O. R. 705.

Priority of the Crown over other creditors to payment of moneys deposited in a bank that has become insolvent. See *Regina v. Bank of Nova Scotia*, 11 S. C. R. 1.

See also *Agotte v. Boucher*, 9 S. C. R. 460.

### BANKS.

I. CHEQUES, 41.

II. DEPOSITS, 42.

III. TAKING COLLATERAL SECURITY.

1. Generally 42.

2. Warehouse Receipts—See BILLS OF LADING AND WAREHOUSE RECEIPTS.

VI. MISCELLANEOUS CASES, 44.

V. WINDING-UP ACT—See CORPORATIONS.

### I. CHEQUES.

The plaintiffs were the holders for value of a cheque drawn by the Mahon Bank on the Bank of Montreal, at London, on the face of which appeared the words "payable at Bank of Montreal, Toronto, at par." The cheque was deposited by the plaintiffs to their own credit with their bank at T., and in the usual course of business was sent by that bank to the Bank of Montreal at T., and by the latter bank was credited to the former. It was then forwarded to L., where it was dishonoured, and in due course was charged back by the Bank of Montreal to the plaintiffs' bank, and again by the latter to the plaintiffs. It appeared that the above words were habitually used by the Mahon Bank on their cheques with the assent of the Bank of Montreal:—Held, that the whole effect of the words was, that the Bank of Montreal at T. would make no charge for cashing the cheque, and that they did not assume the risk of there being funds to meet it, and that they did not lose the right to charge it back on ascertaining there were no funds. *The Rose-Belford Printing Company v. The Bank of Montreal et al.*, 12 O. R. 544.

See *Griener v. The Molson's Bank*, 8 O. R. 162, p. 44.

### II. DEPOSITS.

The plaintiff placed in the hands of one J., a practising solicitor, a mortgage given to the plaintiff by one R., together with a discharge thereof duly executed, for the purpose of enabling J. to receive payment of the mortgage money, which R. was borrowing from a Loan Company, and which it was arranged, between the plaintiff and J., in the presence of the local manager of a bank of which J. was the solicitor, should be deposited by the solicitor in such bank to the credit of the plaintiff, and a deposit receipt obtained therefor. J. did receive the money by a cheque of the Loan Company, amounting with interest to \$6,455, which he deposited in the bank to his private account. About ten days afterwards he drew upon his account for \$3,000, which he deposited in the same bank to the credit of the plaintiff, obtained a deposit receipt therefor in favour of the plaintiff, and transmitted the same to the plaintiff on the 26th of August, 1881, telling the plaintiff in his letter that "the balance will be sent next week." He drew upon the fund for his own purposes, and died, without rendering any account, on the 4th of September following:—Held, that the bank was not affected with notice of the money so deposited being trust moneys, so as to render the bank liable for J.'s misappropriation thereof. After the deposit of the plaintiff's money J. recovered a sum of \$1,182.95 for the defendant S. as her solicitor, which he also deposited in the same account on the 24th of August, 1881. Up to the time of J.'s death the amount at his credit always exceeded this sum:—Held, that the moneys so deposited by J. had been held by him in a fiduciary character, and might be followed by B. & S.; but (in this reversing the judgment of the Court below) as between the plaintiff and S., that S. had a first charge upon the sum at the credit of J. for the full amount of her deposit, and that the balance was applicable to the discharge of the plaintiff's demand. The bank claimed the right to charge against the account in priority to the claims of the plaintiff and S. cheques and notes of J. presented or maturing after notice to the bank of J.'s death:—Held, that they could not do so, and in consequence of having made such claim both in this Court and the Court below, they were refused their costs. *Bailey v. Jellett et al.*, 9 A. R. 187.

### III. TAKING COLLATERAL SECURITY.

1. Generally.

Section 28 of the revised regulations respecting the sale and management of timber on Crown lands in Quebec provides that "limit holders, in order to enable them to obtain advances necessary for their operations, shall have a right to pledge their limits as security without a bonus becoming payable," and it further provides that "if the party giving such pledge shall fail to perform his obligations towards his creditors, the latter \* \* \* may obtain the next renewal in his or their own name subject to payment of the bonus, the transfer being then deemed complete." In 1875 and 1876 one F., who was now represented by the plaintiffs, procured for the purpose of his business operations as a lumberman, certain pecuniary advances from the defendants, the National Bank, through B., their local manager, and to secure repayment, gave to the de-

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fendants certain promissory notes and valuable securities, and as collateral security also gave a written pledge dated September 21st, 1876, of certain timber limits in Quebec, which pledge purported on its face to be "for advances made and to be made" to him. In 1877, with the consent of B., F. cancelled this supposed pledge, and gave what purported to be a new pledge of the licenses to the National Bank, which simply stated that he thereby pledged all his rights, titles, and interests in the licenses to the defendants, and which new pledge was indorsed on subsequent renewals of the licenses. The defendants did not at any time bind themselves to make any further advances to F., but as a matter of fact in 1877, 1878, and 1879, F. continued to receive advances from the defendants. In 1882, F. being still indebted to them in a large sum, and the pledge of the timber limits still in force, the defendants, pursuant to the above section of the regulations, obtained an issue of the licenses directly to themselves. The plaintiffs now brought this action for discovery of the securities held by the defendants on account of F.'s indebtedness, and for redemption, and for a declaration that the defendants had no lien on the timber limits in question:—Held, that as to the advances made before the pledge was given the security was valid, but that as to the future advances, the pledge of the timber limits was invalid as being in contravention of 34 Vict. c. 5, s. 40, (Dom.):—Held, however, that inasmuch as the defendants, although they had obtained the issue of the licenses directly to themselves, and thus procured a complete title to the property, under the above section of the regulations, nevertheless voluntarily restricted their claim to a lien upon it for the whole amount of F.'s indebtedness, they were entitled to judgment declaring such lien, and that on payment of such indebtedness the defendants should convey the property to the plaintiffs:—Held, further, that it was open to the plaintiffs in this action to object to the transaction as contravening the Banking Acts, and it was not necessary for the purpose of such objection that the proceedings should be by the Crown:—Sembie, that if a mortgage upon lands be given to a bank as security for future advances in contravention of the Banking Acts, and after the debt has been contracted or advances made, another mortgage be executed upon the same property as additional security for the debt so contracted or advances made, the second mortgage will be valid. *Grant et al. v. La Banque Nationale*, 9 O. R. 411.—Ferguson.

B., on the 19th January, 1876, transferred to the bank of T. (appellants) by notarial deed a hypothec on certain real estate in Montreal, made by one C. to him, as collateral security for a note which was discounted by the appellants and the proceeds placed at B.'s credit on the same day on which the transfer was made. The action was brought by the appellants against the insolvent estate of C., to set aside a prior hypothec given by C. and to establish their priority:—Held, affirming the judgment of the court of Queen's Bench, that the transfer of B. to the bank of T. was not given to secure a past debt, but to cover a contemporaneous loan, and was therefore null and void, as being a contravention of the Banking Act, 34 Vict. c. 5, s. 40. *Bank of Toronto v. Perkins*, 8 S. C. R. 603.

Sale of security at under value. See *Prentice v. The Consolidated Bank*, 13 A. R. 69, p. 81.

#### IV. MISCELLANEOUS CASES.

The Act as to banks and banking and ware-house receipts does not apply to a foreign banking corporation. See *The Commercial National Bank of Chicago v. Corcoran*, 6 O. R. 527.

Loans made on deposit of stock. See *Carnegie v. The Federal Bank of Canada*, 5 O. R. 418.

A bank manager is not acting without the scope of his authority in accepting the cheque of a customer to deliver to another customer on a particular day, or on the happening of a specified event. *Grieve v. The Molsons Bank*, 8 O. R. 162 C. P. D.

Transfer of stock. See *Smith v. Bank of Nova Scotia*, 8 S. C. R. 558, p. 110.

Proving claims on Insolvent's Estate. See *Eastman v. Bank of Montreal et al.*, 10 O. R. 79, p. 33.

Priority of Crown over other creditors for payment of moneys deposited in a bank that has become insolvent. See *Regina v. Bank of Nova Scotia*, 11 S. C. R. 1.

#### BARRISTER AT LAW.

I. COUNSEL FEE—See COSTS.

II. RETAINER—See SOLICITOR.

Held, that to entitle an English barrister to practise at the bar of Her Majesty's Courts in Ontario, he must be admitted to practise through the Law Society of the Province. *In re De Sousa*, 9 O. R. 39—C. P. D.

#### BASTARD.

Devise to illegitimate child who dies during lifetime of testator, leaving legitimate issue. See *Hargrave et al. v. Keegan et al.*, 10 O. R. 272.

#### BAWDY HOUSE.

A conviction under 32-33 Vict. c. 28, (Dom.) for keeping a house of ill-fame, ordered payment of a fine and costs, to be collected by distress, and in default of distress ordered imprisonment:—Held, good. *Regina v. Walker*, 7 O. R. 186.—Rose.

A conviction, for keeping a disorderly house and house of ill-fame, was—Held bad for awarding, after the adjudication of a penalty by fine and imprisonment, further imprisonment in default of sufficient distress or of non-payment of the fine; and—Held, also, that this was not a mere formal defect within sec. 39 of 32 & 33 Vict. c. 32, (Dom.):—Held, also, that the effect of sec. 28 was not to take away the writ of certiorari. *Regina v. Richardson*, 11 P. R. 95.—Osler.

The defendant was convicted under the proceedings taken under 32 & 33 Vict. c. 32, (Dom.), not 32 & 33 Vict. c. 28, (Dom.), for keeping a house of ill-fame. The conviction merely "ordered" but did not "adjudge" any imprisonment or any forfeiture of the fine imposed:—Held, bad, as substituting the personal order of the magistrate for a condemnation or adjudication. *Regina v. Newton*, 11 O. R. 98.—O'Connor.

The convicted plaintiff "did house and ho stitutes, and the statute," give a satisf sufficient. R sented from. 153—Q. B. D.

See also

BEN

The statute of Benevolent s. O. c. 167. foot.

See GAMING.

BILLS OF EXC

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1. Parties

II. STAMPS, 4

III. TRANSFER

IV. PROTEST

V. MAKER, 4

VI. ENDORSE

VII. ACTIONS

1. Interest

VIII. DEFENCES

1. Consider

(a) Ac

(b) Pa

(c) Fro

2. Time G

3. Other L

IX. MISCELLAN

X. JURISDICT

DIVISION

On an appeal fr had allowed the promissory note v ing made, and not after the repeal of (Dom.) It was:— ing was sufficient

The conviction and warrants charged that plaintiff "did unlawfully keep a certain bawdy house and house of ill-fame for the resort of prostitutes, and is a vagrant within the meaning of the statute," &c., not alleging that she did not give a satisfactory account of herself:—Held, sufficient. *Regina v. Arscott*, 9 O. R. 541, dissented from. *Arscott v. Lilley et al.*, 11 O. R. 133—Q. B. D.

See also *Regina v. Arscott*, 9 O. R. 541.

### BENEVOLENT SOCIETY.

The statute 47 Vict. c. 20, (Ont.) does not apply to Benevolent Societies incorporated under R. S. O. c. 167. *Re O'Heron*, 11 P. R. 422.—Proudfoot.

### BEQUEST.

See WILL.

### BETTING.

See GAMING.—PARLIAMENTARY ELECTIONS.

## BILLS OF EXCHANGE AND PROMISSORY NOTES.

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1. *Partners*—See PARTNERSHIP.

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### IX. MISCELLANEOUS CASES, 52.

### X. JURISDICTION OF DIVISION COURTS.—See DIVISION COURTS.

### II. STAMPS.

On an appeal from the report of a master who had allowed the claim of a creditor based on a promissory note unstamped at the time of its being made, and not properly double stamped until after the repeal of the Stamp Acts by 45 Vict. c. 1 (Dom.). It was:—Held, that such double stamping was sufficient to validate the note, such right

being reserved under the words, "existing or accruing rights are preserved," and that no distinction could be made between a note that was current and a note that was overdue. *Caughill v. Clark*, 3 O. R. 272, and *Bank of Ottawa v. Mc-Morrow*, 4 O. R. 345, referred to and commented on. *Card v. Cooley*, 6 O. R. 229.—Boyd.

The action was brought by T. et al. against G. to recover the amount of a bill of exchange. It appeared that the draft when made, and when received by T. et al., had no stamps; that they knew then that bills and promissory notes required to be stamped, but never gave it a thought, and their first knowledge that the bill was not stamped was when they gave it to their attorney for collection on the 26th February, 1880, and they immediately put on double stamps. The bill was received in evidence, leave being reserved to the defendant to move for a non-suit; the learned judge stating his opinion that though as a fact the plaintiffs knew the bill was not stamped when they received it, and knew that stamps were necessary, they accidentally and not intentionally omitted to affix them till their attention was called to the omission in February, 1880:—Held, 1. That the question as to whether the holder of a bill or draft has affixed double stamps upon an unstamped bill or draft so soon as the state of the bill was brought to his knowledge within the terms of 42 Vict., c. 12, s. 13, (Dom.) is a question for the judge at the trial and not for the jury. (Gwynne, J., dissenting.) 2. That the "knowledge" referred to in the Act is actual knowledge and not imputed or presumed knowledge, and that the evidence in this case showed that T. acquired this knowledge for the first time on the day he affixed stamps for the amount of the double duty, 26th February, 1880. 3. That the want of proper stamping in due time is not a defence which need be pleaded. (Gwynne, J., dissenting.) *Chapman v. Tufts*, 8 S. C. R. 543.

R. remitted by mail to V. a draft on Bay of Fundy Quarrying Co., Boston, Mass., in payment of an account of the company, of which R. was superintendent. The draft, when received by V., was unstamped, and V. affixed stamps required by the amount of the draft, and initialed them as of the date the draft was drawn, which was at least two days prior to the date on which they were actually affixed. The draft was not paid, and an action was brought against R., who pleaded, according to provisions of Cons. Stats. New Brunswick, c. 37, s. 83, sub-s. 4, "that he did not make the draft." On the trial the draft was offered in evidence and objected to on the ground that it was not sufficiently stamped, the plaintiff having previously testified as to the manner in which the stamps were put on, and having also sworn that he knew the law relating to stamps at the time. The draft was admitted, subject to leave reserved to defendant to move for a nonsuit, and at a later stage of the trial it was again offered with the double duty affixed. The trial resulted in counsel agreeing that a non-suit should be entered with leave reserved to defendant to move for verdict, court to have power to draw inferences of fact. On motion, pursuant to such leave reserved, the Supreme Court of New Brunswick set aside the non-suit and ordered a verdict to be entered for the plaintiff on the ground that the defect in the draft of want of stamp should have been specially plead-

ed. On appeal to the Supreme Court of Canada:—Held, Strong and Gwynne JJ. dissenting, that double duty should have been placed on the note as soon as it came into the hands of the drawee unstamped, and that it was too late at the trial to affix such double duty, the plaintiff having sworn that he knew the law relating to stamps, which precludes the possibility of holding that it was a mere error or mistake:—Held, also, that under the plea that defendant did not make the draft, he was entitled to take advantage of the defect for want of stamps. Per Strong J., that the note was sufficiently stamped and plaintiffs were entitled to recover. Per Gwynne J., that if the note was not sufficiently stamped the defence should have been specially pleaded. *Roberts v. Vaughan*, 11 S. C. R. 273.

## II. TRANSFER.

In an action on a promissory note it was shewn that after maturity and while the payee continued to be the holder, the maker supplied the payee and others with board, &c., the value of which it was agreed should be applied in payment or reduction of the note:—Held, (reversing the judgment of the county judge,) that a subsequent transfer of the note could only be made subject to the claim of the maker for such board, &c.; and that such claim was an equity which attached to the note in the plaintiff's hands. *Ching v. Jefferys*, 12 A. R. 432.

## III. PROTEST AND NOTICE OF DISHONOUR.

The defendant, a married woman, was entitled to dower in the lands of a former husband who died in 1866, but dower had not been assigned to her. After the death of her said husband she continued to reside on the lands till 1882, when she indorsed a note for the accommodation of her son, and to an action thereon she set up that she had no separate estate, but even if she had, being an accommodation indorser only, she was not liable. A judgment having been rendered against her, she moved for a new trial, alleging in addition to her former defence, want of notice of dishonour. That application having been refused she appealed to this Court, when the ruling of the learned Judge below was affirmed, as the production of the protest for non-payment was sufficient evidence of the notice of dishonour, and there was not any merit in the other defence sought to be raised. *Southam v. Ranton et al.*, 9 A. R. 530.

The Merchants Bank of Halifax (appellants) as holders of promissory notes endorsed by McN. (respondent) brought an action against him for their amount. The notes were dated at Summerside, and were payable at the agency of the Merchants Bank of Halifax, Summerside. The defendant resided at the town of Summerside, and his place of business was there. Notices of dishonour were given to defendant by posting such notices, addressed to the defendant at Summerside, at 1 o'clock p. m. on the day after the day on which the notes matured, the postage on such notices being duly prepaid in both cases. There is no local delivery by letter carriers from that post office in Summerside. No evidence was given by defendant that he did not receive the notices of dishonour, nor was any evidence given

by the plaintiffs that the defendant had received them. The jury found for the defendant, contrary to the charge of the learned judge. A rule nisi having been granted to set aside this verdict, and for a new trial, the court discharged this rule nisi and directed the verdict to stand on the ground that the posting of the notices of dishonour to the defendant was not sufficient notice of dishonour, inasmuch as both plaintiff and defendant resided in the same town, and the notices of dishonour should have been delivered to the defendant personally, or left at his residence or place of business:—Held, reversing the judgment of the court below, that since the passing of 37 Viet. c. 47, s. 1 (Dom.), the notices given in the manner above set forth were sufficient. *Merchants Bank of Halifax v. McNutt*, 11 S. C. R. 126.

See also *Ontario Bank v. Burke et al.*, 10 P. R. 561.

## IV. MAKER.

Action against the defendant as the maker of a promissory note. Before the defendant's signature was, as alleged, the word *per*, and underneath was the name "William Stockdale, manager." The alleged note was given in renewal of a note made by the Toronto Patent Wheel and Wagon Company, limited, and was brought to the defendant by plaintiff for the purpose of having it executed by the company, when defendant, who was the secretary of the company, signed it, the intention being that the company's name should be filled in over defendants by the company's manager, by stamping it with defendant's stamp, but which was not done. After the note became due, the plaintiff proved on it against the company who had gone into insolvency, and obtained a dividend:—Held, that the defendant was not liable. Per Cameron, C. J.—The defendant must be treated as maker of the note, extrinsic evidence not being admissible to change its legal effect: that the word "*per*" as written, would not assist defendant, for it might be treated as merely a flourish to the initial letter to defendant's name; but, even if assumed to be *per*, i. e., by, it would merely signify that the name Wm. Stockdale was written by defendant, which the evidence shewed was not the case; but that the plaintiff by proving against the company on the note and accepting a dividend thereon, had elected to look to the company, and thereby absolved the defendant. Per Osler, J. A.—The defendant could not be treated as maker of a note, for the evidence shewed that the instrument never was perfected as a note; and that this was no infringement of the rule as to the admission of parol evidence, for its effect was not to alter a note but to shew that the condition upon which it was to become a note had not been performed:—Held, that the provisions of sec. 7 of 40 Viet. c. 43 (Dom.), did not apply to this note, as it did not purport to be a note signed by or on behalf of the company. *Brown v. Howland*, 9 O. R. 48—C. P. D.

See *Bank of Hamilton v. Harvey*, 9 O. R. 653 p. 52.

## V. ENDORSER.

Rights of endorser against principal debtor. See *Harper v. Culbert et al.*, 5 O. R. 152.

A promissory note, but was banking corporation, and that the indorser thereon as a charge interest if possible, liable to pay their contract.

A note dated and endorsed interest at the until paid. tained in a n given by the lateral security defendant covered \$3,000 on the est thereon at per annum und recovered upon the This master al this debt six p recovery of the per construction and the covenan that interest at should be paid not that interes such day if the unpaid. *St. John* See also *Bank* 145.

## VII.

### 1. Consideration

#### (a) Accommodation

See *Southam* p. 47.

#### (b) Partial

K., acting as a wife, but which for his own bus that certain good essed curative c saleable, and the buy a quantity a therefor. In an tiff company, the part of the amo been obliged to p jury found that t that defendant h the misrepresenta no consideration of the pads, whic plaintiff could no of consideration, definite computat over pro tanto, and been more than co also, that the def against the plain tained, without h

## VI. ACTIONS ON.

## 1. Interest Recoverable.

A promissory note was dishonoured at maturity, but was not protested by the holders (a banking corporation) because of a waiver by the indorsers of presentment and notice:—Held, that the indorsers were not liable to pay interest thereon as a debt. Nor could a contract to pay interest be deduced from a usage of banks to charge interest on overdue debts, and to collect it if possible:—Sembler, the indorsers would be liable to pay interest as damages for breach of their contract. *Re McDougall*, 12 A. R. 265.

A note dated 11th January, 1862, payable to and endorsed by one S. H., was for \$3,000, with interest at the rate of two per cent. per month until paid. By a covenant for payment contained in a mortgage deed of the same date, given by the defendant to the plaintiff as a collateral security for the payment of this note, the defendant covenanted to pay "the said sum of \$3,000 on the 11th day of July, 1862, with interest thereon at the rate of twenty-four per cent. per annum until paid." A judgment was recovered upon the note, but not upon the covenant. The master allowed for interest in respect of this debt six per cent. only from the date of the recovery of the judgment:—Held, that the proper construction of the terms of both the note and the covenant as to payment of interest was, that interest at the rate of twenty-four per cent. should be paid up to the 11th July, 1862, and not that interest should be paid at that rate after such day if the principal should then remain unpaid. *St. John et al. v. Rykert*, 10 S. C. R. 278.

See also *Bank of Hamilton v. Harvey*, 11 P. R. 145.

## VII. DEFENCES TO ACTIONS.

## 1. Consideration as a Ground of Defence.

## (a) Accommodation or Want of Consideration.

See *Southam v. Ranton et al.*, 9 A. R. 530, p. 47.

## (b) Partial Failure of Consideration.

K., acting as agent for the plaintiff company, his wife, but which was in reality a trading name for his own business, fraudulently represented that certain goods manufactured by himself possessed curative or medicinal qualities and were saleable, and thereby induced the defendant to buy a quantity and to give his promissory note therefor. In an action on the note by the plaintiff company, the defendant counter-claimed for part of the amount of the note, which he had been obliged to pay to an innocent holder. The jury found that the articles sold were valueless: that defendant had been induced to purchase by the misrepresentations, and that he had received no consideration for the note, except as to some of the pads, which he had sold:—Held, that the plaintiff could not recover, for the partial failure of consideration, being for an amount capable of definite computation, could be set up as an answer pro tanto, and the consideration received had been more than covered by the sum paid:—Held, also, that the defendant was entitled to recover against the plaintiff company the damages sustained, without having previously offered to re-

turn the goods. *Star Kidney Pad Company et al. v. Greenwood*, 5 O. R. 28—Q. B. D.

## (c) Fraud and Illegal Consideration.

To an action on four promissory notes made by the defendant and one H., payable to the plaintiff, the defendant set up that the notes were given for the purchase of the plaintiff's interest in certain homestead lands in the State of Michigan, H. being the purchaser and defendant surety: that under the laws of Michigan only persons of 21 years of age could homestead lands; and that the plaintiff was under that age. There was no representation that plaintiff was of age, and H. obtained from plaintiff a surrender of his interest in the land, whereby he was enabled to have himself located in his stead, which he otherwise might have had difficulty in doing, and he got the same rights which he would have got if the plaintiff had been of full age:—Held, that it could not be said that there was no consideration for the notes, nor any misrepresentation; and the plaintiff was therefore held entitled to recover. *Fletcher v. Noble*, 8 O. R. 122—C. P. D.

Counter claim alleging fraud in obtaining the note. See *Morrison et al. v. Earls*, 5 O. R. 434; *Garland v. Thompson*, 9 O. R. 376.

The defendant R. having been charged with misapplying fines paid into his hands as a justice of the peace, and proceedings instituted against him in respect thereof, the plaintiff, pending an investigation of the charge, volunteered his aid to assist R. in effecting a settlement of the amount claimed by the municipality, which he undertook to discharge upon the defendant R. giving his promissory note for the amount, indorsed by his wife. The plaintiff thereupon settled the amount claimed by giving his note therefor, which he alleged he had subsequently paid, and the defendants joined in a promissory note in the manner proposed by the plaintiff:—Held, affirming the judgment of the court below, 2 O. R. 25, that the transaction in effect amounted to a compromise of a criminal charge, and therefore that plaintiff was not entitled to recover on the note given by the defendant. *Bell v. Riddell*, 10 A. R. 544.

See *Star Kidney Pad Company et al. v. Greenwood*, 5 O. R. 28, *supra*.

## 2. Time Given for Payment.

Held, that evidence of a parol agreement to extend for two years the time for the payment of a note payable on demand, was not admissible. Per Galt, J.—Even if the evidence was admissible, by the terms of the agreement, in this case, the time was to be suspended only on performance of certain conditions, which the defendant had failed to do, and therefore the plaintiff was entitled to enforce immediate payment. *Porteous et al. v. Muir et al.*, 8 O. R. 127—C. P. D.

On the 29th August, 1877, defendant R. made a note of that date for \$700, at eighteen months, in favour of D., and for his accommodation, which R. gave to D. without any restriction as to its use. D. endorsed the same and handed it to the plaintiff; and at the same time gave the plaintiff his, D.'s, own note of the same date at three months, taking from plaintiff the following



receipt: "Received from R. a note endorsed by D., payable eighteen months after date, for \$700, which note is given me only as collateral security for the payment of certain note endorsed by me for D.; and when said note is fully paid, I agree to return same." On the 24th September, a statement of account took place between the plaintiff and D., when D. took up the note of the 29th of August, by giving plaintiff another note for the like amount at three months:—Held, *Rose, J.*, dissenting, that the true construction of the agreement was, that D. should have eighteen months, or so much thereof as the plaintiff chose to give him, in which to pay off the \$700; and that D.'s note might be renewed from time to time, so long as payment was not extended beyond the eighteen months; and that under the circumstances the note of the 24th September could not be deemed to have been taken as a payment of the note of 29th of August. *Devanney v. Brownlee*, 8 A. R. 355, distinguished. *Per Rose, J.*—"The effect of the agreement was, that the note was given as collateral security for the payment within the time limited by D.'s note, namely, three months; and the fact that R. had eighteen months to make payment, could make no difference; and that, apart from the question whether the transaction of the 24th of September constituted a payment or not, it operated as a suspension of R.'s rights, whereby she was discharged. *Healey v. Dolson et al.*, S. O. R. 691—C. P. D.

After the maturity of a note for \$300, and after an action had been commenced against the defendant, one of the endorsers thereof, alleged to be a surety, the principal debtor executed a document whereby he acknowledged his liability on the note, notwithstanding that defendant had been sued solely thereon, the Statute of Limitations or any legal or equitable defence that might be set up; and he covenanted to pay the note and interest by half-yearly payments of \$50 each. There was contradictory evidence as to the acceptance of the document by the plaintiff:—*Quære*, whether the document, if accepted by plaintiff, constituted a discharge of the surety by the giving of time; and whether the statement of the pendency of the action against defendant could be looked upon as a reservation of plaintiff's rights against him. *Pirie v. Wyld*, 11 O. R. 422—C. P. D.

### 3. *Other Defences.*

In an action by the plaintiffs as endorsees of a bill of exchange, the defendant (the acceptor) set up that the bill was part of the price of goods bought by them from H. & G., the drawers, and filed a counter-claim against the plaintiffs, and H. & G. as defendants by counter-claim, claiming that the bill was transferred to the plaintiffs after maturity, with full notice and knowledge of the facts, and claiming \$10,000 damages from H. & G. for breach of contract in respect of the goods, and asking for the delivery up and cancellation of the bill, and other bills in the same transaction. Upon the application of H. & G. the Master in Chambers struck out the counter-claim, and the names of H. & G. as defendants:—Semble, that as against the plaintiffs, the defence should have been pleaded as a defence to the claim on the bill. *Torrance et al. v. Living-*

stone, 10 P. R. 29.—Hodgins, *Master-in-Chancery*

An action was brought by the Bank of P. E. I. against the appellant on a promissory note, to which he pleaded set-off of a draft made by the plaintiffs and endorsed to him; to this there was a replication that the defendant was a contributory on the stock book of the bank, and knew that the bank was insolvent when the draft was purchased; the defendant demurred on the ground that the replication did not aver that the debt for which the action was brought was due from the defendant in his capacity as share holder or contributory:—Held, reversing the judgment of the court below, that the replication was bad in law. *Ings v. The Bank of Prince Edward Island*, 11 S. C. R. 265.

Plea of payment to garnishor. See *Roblee v. Rankin*, 11 S. C. R. 137.

The statement of claim was, that the defendant, being a director of a company, jointly and severally with three others made a promissory note payable to said company, with the intent that it should be used by the company upon the credit of the makers for the purposes of the company, and the company indemnified the makers against liability thereon; that the plaintiffs discounted the note for the company, and with the knowledge and consent of the defendant, paid the proceeds to the company, and the money was applied to the purposes of the company, and that after default in payment the defendant gave security to the plaintiffs against his liability upon the note:—Held, on demurrer, statement of claim good, and that the plaintiffs were entitled to recover against the defendant the amount of the note, though not a negotiable instrument. *Bank of Hamilton v. Harvey*, 9 O. R. 655.—Wilson.

See also *The Federal Bank v. Hope*, 6 O. R. 209; *Molsons Bank v. Turley*, 8 O. R. 293.

### VIII. MISCELLANEOUS CASES.

A cheque given in settlement of losses at matching coppers is a note of hand given in consideration of a gambling debt within sec. 53, subsec. 3, R. S. O. c. 47, and such a security is void under 9 Anne c. 14, even in the hands of a bona fide holder for value. *In re Summerfeldt v. Worts*, 12 O. R. 48—Q. B. D.

D. J. endorsed a promissory note for the accommodation of W. J., who discounted it, and gave D. J. a mortgage on certain land to indemnify him against his liability as indorser on the note. W. J., during the currency of the note, absconded, after obtaining from M. by false pretences a cheque for a large sum, which he cashed, and gave part of the proceeds to D. J. to take up the note, which D. J. did before maturity. W. J. told D. J. that he had got the money from M. with whom he had had dealings, as D. J. knew, but D. J. had no notice of any wrong doing in connection with the money:—Held, affirming the judgment of Boyd, C., 10 O. R. 1, that the mortgage ceased to be an incumbrance on the land when the note was retired; that M. could not follow his money into the note, and was therefore not entitled to stand in the shoes of D. J. as to the security held by him, even if it had been a mortgage to secure the payment of the note. *Jack v. Jack*, 12 A. R. 476.

Where certain collateral for \$81,000, which note given, such debt is discharged. 10 P. R. 107.

Action to re-  
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of Montreal, 12

Securing end  
*Barber v. Mac*

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## BILLS OF LA

C. & O., carry on the state of Illinois machinery, &c., manufactured for their warehouse with C. & Co. being partners in Chicago, Illinois, their notes of \$800,000, plaintiffs, endorse warehouse receipts for the purity of the notes, to retire them, in payment to effect the withdrawal of new ones, do make out direct to the trustee in Chicago, member, 1883, C. & O. On 2nd day of execution in the hands of C., under which the fraudulent preference field, that the plaintiff could person C. & C. being trustee the transfer must be made at that state according to valid and effectual subject to the law of the warehouse receipt field the goods for sale therefore a transfer of the goods to the trustee's rights, if in the hands of third parties Bills of Sale Act of 1882, to act as to bank receipts, did not apply to the corporation. (C. & O. v. C. & O.) At the request of the Canadian government of money, Mr. C. & O. to the government to the certain car which could obtain a raise money. The year of a portion of the wheels a valuation of \$5. The plaintiff him a written could be forthcoming to a warehouse

Where certain securities had been assigned as collateral for the payment of a promissory note of \$1,000, which note was partly paid and a new note given, such securities may be held until the debt is discharged by payment. *Wiley v. Ledgall*, 10 P. R. 182.—Hodgins, *Master-in-Ordinary*.

Action to recover back amount paid by acceptor on a forged bill.—Denial of signature of drawer and endorser. See *Ryan v. The Bank of Montreal*, 12 O. R. 39.

Securing endorser by chattel mortgage. See *Barber v. Macpherson*, 13 A. R. 356.

See also *Hall v. Griffith et al.*, 5 O. R. 478; *Lionais v. Molsons Bank*, 10 S. C. R. 526.

## BILLS OF LADING AND WAREHOUSE RECEIPTS.

C. & O., carrying on business in Chicago, in the state of Illinois, for the manufacture of mill machinery, &c., had certain machinery manufactured for them in Stratford, Ont., which was warehoused with M. & T., at Woodstock, Ont. C. & O. being pressed by plaintiffs, their bankers in Chicago, for collateral security for two of their notes of \$5,000 each, discounted by the plaintiffs, endorsed over to the plaintiffs the warehouse receipts for these goods. At the maturity of the notes, C. & O. not being able to retire them, in pursuance of an arrangement to that effect the warehouse receipts were cancelled and new ones, dated 12th October, 1883, were made out direct to the plaintiffs. On 3rd September, 1883, C. & O. had made an assignment to a trustee in Chicago for the benefit of creditors. On 2nd November defendant placed writs of execution in the sheriff's hands against C. & O., under which these goods were seized. No fraudulent preference or intent was proved.—Held, that the plaintiffs, a foreign corporation, could hold personal property in Ontario; that C. & O. being residents of the state of Illinois, the transfer must be governed by the law of that state according to which the transfer was valid and effectual; that, even if dealt with as subject to the law of Ontario, when C. & T. gave the warehouse receipts direct to the bank they held the goods for the plaintiffs, and there was therefore a transfer of both property and possession in the goods to the plaintiffs, subject to the trustee's rights, if any; and the goods being in the hands of third parties and not of C. & O., the Bills of Sale Act did not apply; and also that the Act as to banks and banking, and warehouse receipts, did not apply to the plaintiffs, a foreign corporation. *Commercial National Bank of Chicago v. Corcoran*, 6 O. R. 527—C. P. D.

At the request of the Consolidated Bank, to whom the Canada Car Company owed a large sum of money, M. consented to act as warehouseman to the company for the purpose of storing certain car wheels and pig iron, so that they could obtain warehouse receipts upon which to raise money. The company granted M. a lease for a year of a portion of their premises, upon which the wheels and iron were situate, in consideration of \$5. The Consolidated Bank then gave him a written guarantee that the goods should be forthcoming when required, and he issued a warehouse receipt to the company

for the property, which they endorsed to the Standard Bank and obtained an advance thereon, which they paid to the Consolidated Bank. It appeared that M. was a warehouseman carrying on business in another part of the city; that he acquired the lease for the purpose of giving warehouse receipts to enable the company to obtain an advance from the Consolidated Bank; and that he had not seen the property himself, but had sent his foreman to examine it before giving the receipt. In February, 1877, an attachment in insolvency issued against the company, and K. et al., as their assignees in insolvency, took possession of the goods covered by this receipt, claiming them as part of the assets of the estate. M. then sued K. et al. in trespass and trover for the taking:—Held, (per Strong, Taschereau, and Gwynne, J.J.,) affirming the judgment of the Court of Appeal, 3 A. R. 35, and that of the court of Queen's Bench, 43 Q. B. 78, that M. never had any actual possession, control over, or property in, the goods in question so as to make the receipt given by M., under the circumstances in this case, a valid warehouse receipt within the meaning of the clauses in that behalf in the Banking Act. Per Ritchie, C. J., and Fournier and Henry, J.J., contra, that M. quoad these goods was a warehouseman within the meaning of 34 Vict. c. 5, (Dom.), so as to make his receipt endorsed effectual to pass the property to the Standard Bank for the security of the loan made to the company in the usual course of its banking business. *Milloy v. Kerr*, 8 S. C. R. 474.

The appellants discounted for a trading firm, on the understanding that a quantity of coal purchased by the firm should be consigned to them, and that they would transfer to the firm the bills of lading, and should receive from one of the members of the firm his receipt as a wharfinger and warehouseman for the coal as having been deposited by them, which was done, and the following receipt was given: "Received in store in Big Coal House warehouse at Toronto, from Merchants Bank of Canada, at Toronto, fourteen hundred and fifty-eight (1,458) tons stove coal, and two hundred and sixty-one tons chestnut coal, per schooners "Dundee," "Jessie Drummond," "Gold Hunter," and "Annie Mulvey," to be delivered to the order of the said Merchants Bank to be endorsed hereon. This is to be regarded as a receipt under the provisions of statute 34 Vict. c. 5—value \$7,000. The said coal in sheds facing esplanade is separate from and will be kept separate and distinguishable from other coal. (Signed,) W. Snarr. Dated 10th August, 1878." The partnership having become insolvent, the assignee sought to hold the coal as the goods of the insolvents, and filed a bill impeaching the validity of the receipt. The chancellor, who tried the case, found that the receipt given was a valid receipt within the provisions of the Banking Act, and was given by a warehouseman, and that the bank was entitled to hold all the coal in store of the description named in the receipt. This judgment was reversed by the Court of Appeal for Ontario, and on appeal to the Supreme Court of Canada it was:—Held, reversing the judgment of the Court of Appeal, 8 A. R. 15, that it is not necessary to the validity of the claim of a bank under a warehouse receipt, given by an owner who is a warehouseman and wharfinger, and has the



goods in his possession, that the receipt should reach the hands of the bank by indorsement, and that the receipt given by W. S. in this case was a receipt within the meaning of 34 Vict. c. 5 (Dom.). 2. (Ritchie, C. J., and Strong, J., dissenting.) that the finding of the chancellor as to the fact of W. S. being a person authorized by the statute to give the receipt in question should not have been reversed, as there was evidence that W. S. was a wharfinger and warehouseman. 3. (Per Fournier, Henry, and Taschereau, JJ.), that secs. 46, 47 and 48 of 34 Vict. c. 5 (Dom.), are intra vires of the Dominion Parliament. *Mercants Bank of Canada v. Smith*, 8 S. C. 512.

T., a miller gave warehouse receipts for wheat to the plaintiffs attached to notes made by him, payable to their order, to take up his overdue notes which were secured by like receipts. The receipts were in the following form: "Received in store in my warehouse or mill from farmers, 2,000 bushels of wheat, to be delivered to the order of myself, to be endorsed hereon. This is to be regarded as a receipt under the provisions of statute 43 Vict. c. 22. The said wheat is separate from and will be kept separate and distinguishable from other grain." The receipts were endorsed in blank. T. did not keep the wheat covered by the receipts distinct, but ground some of it into flour and allowed the remainder to be mixed with wheat subsequently brought in by farmers and others. Before assigning in trust for creditors, he pointed out to the plaintiffs one carload of flour made from the wheat covered by the receipts, and admitted that the wheat and flour in his mill was covered by the receipts, and the next day the bank took possession. The evidence shewed that there was about the same quantity of wheat and flour in and about the mill at the date of the last receipt as there was in dispute in this interpleader. T. subsequently assigned, and the defendants afterwards recovered a judgment against him. In an interpleader action to try the right of the bank under their warehouse receipts as against the defendants under their execution:—Held, that a special endorsement of the receipts to the plaintiffs was not essential, and that the endorsement in blank of the receipts satisfied all the requirements of the Banking Act, that Act not specifying any particular mode in which the property in the receipt is to be transferred, and that the notes and receipts attached might be read together:—Held, also, that the mode of acquiring the receipts, viz., by delivering up the overdue notes with receipts, was unobjectionable, the transaction being in fact a negotiation of the notes by the surrender of the antecedent lien upon the wheat of T.; or at any rate there was a mere substitution or continuation of securities according to the original understanding of the parties:—Held, also, that T., having undertaken to keep "the grain separate and distinguishable from other grain," and having failed to do so, it became his duty to enable the plaintiffs to recover what the receipts called for or its equivalent, and having done this while able to dispose of his property, the warehouse receipts attached upon the property so indicated by him, and the plaintiffs were entitled to succeed against the execution creditors. *The Bank of Hamilton v. The John T. Noye Manufacturing Co.*, 9 O. R. 631.—Boyd.

In proceedings taken in the master's office to administer the estate of M., which was insolvent,

the M. and D. banks brought in their claims as creditors. Other creditors opposed these claims on the grounds that the banks had been paid large sums in reduction of their debts by assets of the deceased, which they had taken after his death and before administration. The banks set up their right to the assets so taken under warehouse receipts therefor, signed by H. and held by them. It appeared that M., who was a provision merchant, in his lifetime had obtained advances from the banks on the faith of his receipts being valid securities, he represented to them that he had rented the cellar of his warehouse to H. as warehouseman, and that as such H. had sole charge of the cellar. Before the receipts matured, M. disappeared and was subsequently found dead. Before his death became known, H. and his solicitor took possession of the cellar and the property covered by the receipts, and posted up in the cellar a notice stating that H. held the property therein as warehouseman of the banks, to whom he had granted the receipts. Two days after taking possession, H. refused to be any longer responsible for the property, which was subsequently taken by the banks under their receipts, and as it was rapidly deteriorating was sold by them. At the time of the sale there was no personal representative of M.'s estate, nor was there any execution creditor. It appeared by the evidence of H. that he had signed the receipts at M.'s request and as a matter of form, but that he had not leased the cellar, nor had he any control over it nor the property contained in it:—Held, that the receipts were good between the parties and by the result of the subsequent dealings they were rehabilitated so as to be valid against creditors by the act of intervention on H.'s part during the life of M., but in any event, there being no creditor who had any locus standi when the banks so under the receipts, they had the right to apply the proceeds to reduce their claim against M.'s estate. Per Boyd, C.—There are two classes of persons authorized to issue warehouse receipts by section 7 of 43 Vict. c. 22 (Dom.), (substituted for 34 Vic. c. 5, s. 45 (Dom.)), viz., bailees of goods and keepers of a warehouse, &c., and the same sort of proof is not required in the case of the latter as in the former. The test of their validity does not necessarily depend upon proving that the warehouseman was actually, visibly and continuously in possession of them from first to last. Per Proudfoot, J.—That section authorizes persons who are not warehousemen alone, but who may have other business also, to give receipts, but these are comprised in the definition of "warehouse receipt," previously given in the statute, which requires the goods to be in the "actual, visible and continued possession of the bailee." *Re Montith—Merchants Bank et al. v. Montith* 10 C. R. 329—Chy. D.

The execution debtors, C. & Son, bought the oats in question from persons who shipped the oats to Toronto consigned to their (the sellers') order, or to the order of some bank other than the plaintiffs, sending the shipping receipt with the draft for the price of the oats attached to C. & Son at Toronto. The latter then took the shipping receipt to the plaintiffs, who advanced the money thereon to pay the draft, returning the shipping receipt to C. & Son for the purpose of obtaining the oats from the carriers, after taking from C. & Son a receipt in these words: "I

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## BILLS OF \$

## I. GENERALLY

## II. FORM AND I

### III. REGISTRATION

1. *Affidavit*
2. *Registrar*
3. *Change of*

#### IV. DESCRIPTION

## V. CONSIDERATIONS

## VI. WHO MAY I

## VII. FRAUD AND

See FRAUD

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received in trust from the Dominion Bank bill of lading for — bushels oats, and I hereby undertake to sell the property specified for said bank and collect the proceeds of sale or sales thereof and deposit the same with the said bank, in Toronto, to the credit of same, I hereby acknowledging myself to be bailee of the said property for the said bank." C. & Son received the oats from the carriers and warehoused them, taking warehouse receipts in their own name, which they endorsed to the plaintiffs, who then gave up the bailee receipt:—Held, that no property in the oats had passed to C. & Son when the plaintiffs made the advance, and that the latter were therefore entitled, at least as equitable owners, as against execution creditors of C. & Son. The Chattel Mortgage Act could have no application, for when the oats first came into the possession of C. & Son, they came charged with or subject to the plaintiffs' title. *Dominion Bank v. Davidson et al.*, 12 A. R. 90.

Construction of conditions in bill of lading—liability of carriers. See *Hately et al. v. Merchants Despatch Transportation Co. et al.*, 12 A. R. 201, p. 73.

## BILLS OF SALE AND CHATTEL MORTGAGES.

### I. GENERALLY, 57.

### II. FORM AND REQUISITES OF, 58.

### III. REGISTRATION AND CHANGE OF POSSESSION.

1. *Affidavit of Bona Fides*, 59.
2. *Registration*, 60.
3. *Change of Possession*, 61.

### IV. DESCRIPTION OF GOODS, 61.

### V. CONSIDERATION AND BONA FIDES, 62.

### VI. WHO MAY IMPEACH, 63.

### VII. FRAUD AND FRAUDULENT PREFERENCES—See FRAUDULENT CONVEYANCES.

### I. GENERALLY.

An incorporated trading company being in insolvent circumstances, the president and secretary on the 15th August, 1884, in pursuance of a resolution of the board of directors joined in executing to the plaintiffs—one of whom was president of the company—as trustees for creditors, assignment of all the real and personal estate of the company, stock in trade, &c., "and all other, personal estate and effects whatsoever and wheresoever, and whether upon the premises where the company's business is now carried on or elsewhere which the company is possessed of or entitled to in any way whatsoever;" which assignment was duly filed on the following day, and the business was continued as before until the 23rd of the same month, when letters were written by the secretary in which the trustees were mentioned, and five days later Whiting, one of the trustees, demanded and received from the manager of the company the keys of the post office box, and directed the manager to keep the concern running. On the 4th of October the first of several executions against the goods of the company was sued out and placed in the sheriff's

hands:—Held, (overruling *Robertson v. Thomas*, 8 O. R. 20), that assignments for the benefit of creditors were until 48 Vict. 26 (Ont.), within the Act relating to chattel mortgages and bills of sale; R. S. O. c. 119. *Whiting et al. v. Horey et al.*, 13 A. R. 7.

A, having purchased from B. a half interest in a celebrated brood mare, paid in his purchase money \$50 more than the half interest was worth, on the understanding that B. was to keep and take care of the mare for a year, when A. was to have her, and her expenses were thereafter to be shared equally between them. The bargain was, that they were to keep her for breeding purposes and share the profits equally. During the year, and while in B.'s possession, she was seized and sold by the sheriff under an execution against B., but notice of A.'s claim was given to the sheriff and publicly at the sale. Subsequently the mare had a colt which was in *gremio* at the time of the sale. In an action by A. against C., the purchaser at the sheriff's sale, in which C. contended that the Bills of Sale Act, R. S. O. c. 119, avoided the plaintiff's title as against the execution, it was:—Held, that the Act was intended to apply to personal chattels susceptible of specific ascertainment and of accurate description, and capable of being transferred and possessed in specie, and did not apply to an indivisible chattel like that in the present case; that A. and B. were tenants in common of the mare; that B.'s possession of the mare was not his sole or exclusive possession, but the possession of both; that the sheriff's sale passed only B.'s interest in the mare, and C. by his purchase became a co-owner with A.; and that the property in the colt followed that of its dam, and that A. was an owner of an undivided moiety in both. *Gunn v. Burgess*, 5 O. R. 685.—Boyd.

### II. FORM AND REQUISITES OF.

A formal defect in a chattel mortgage may be cured by a conveyance at any time before an execution reaches the sheriff's hands, but such conveyance whether effected by a deed or by delivery only, has no retroactive operation, and if void for intent to prefer under R. S. O. c. 118, would not suffice to cure the defects. *Smith v. Fair*, 11 A. R. 755.

The plaintiff sued for conversion of certain "wethers lying on the island in the mouth of the river Moira," claimed by him under a written instrument, not under seal, whereby A., the owner, assumed to assign the wethers to the plaintiff, as security for money lent. The defendants asserted a lien on the wethers for advances to A., and also alleged that there had been an actual delivery thereof to them, under which they had taken possession prior to the plaintiff's mortgage:—Held, that the instrument was a good mortgage, though without seal, and was not void for want of registration as against the defendants claiming under the alleged prior delivery. The alleged lien for advances could not be enforced against the plaintiff, who was found by the jury to be an innocent mortgagee for value; and the jury having upon contradictory evidence found against the alleged prior delivery, the refusal of the judge of the County Court of Hastings to disturb the verdict was affirmed. *Paterson v. Maughan*, 39 Q. B. 371, approved of and followed. *Hall v.*

*Collins Bay Rafting and Forwarding Company*, 12 A. R. 65.

It is essential to the validity of a chattel mortgage to secure the mortgagee against the indorsement of any bill or note, &c., under sec. 6 of R. S. O. c. 119, that it should set forth fully the agreement between the parties and the amount of the liability intended to be created, and that the liability which it professes to secure, should be truly stated. *Barber v. Macpherson*, 13 A. R. 356.

In November, 1881, the plaintiff endorsed a note for the accommodation of M. for \$550 at three months, and as indemnity against any liability in respect thereof, or of any renewal, took from M. a chattel mortgage which was only renewed once, although the note remained unpaid until the 4th of November, 1882, when \$50 was paid by M. on account, and a new note at six months was given for \$500 in which the plaintiff joined as maker instead of as indorser, and after this note became due and had remained unpaid for six months the plaintiff obtained a second mortgage from M., reciting that he had indorsed a note for \$550, which had not been paid, and that plaintiff was still liable thereon, or on the renewal thereof, and was liable to be called upon at any time to pay the amount, and the plaintiff was called upon to pay and actually did pay the note and interest amounting to about \$590. In an interpleader proceeding at the instance of an execution creditor of M.:—Held, (affirming the judgment of the County Court) that the mortgage was void as against such creditor. The distinction between mortgages under the 1st and under the 6th section of the Act, considered and acted on. The distinction between the two classes of cases provided for by the 6th section, considered. *Kough v. Price*, 27 C. P. 309; *Ontario Bank v. Wilcox*, 42 Q. B. 329, commented on. *Id.*

See *The Stevens, Turner & Burns Foundry and General Manufacturing Company (Limited) v. Barfoot*, 9 O. R. 692, p. 60; *Kitching v. Hicks et al.* 6 O. R. 739, p. 60; *Parke v. St. George*, 10 A. R. 496, p. 63. See also *Robinson et al. v. Cook*, 6 O. R. 590.

### III. REGISTRATION AND CHANGE OF POSSESSION.

#### 1. Affidavit of Bona Fides.

The plaintiffs sold a portable saw-mill, engine, boiler, &c., to O. & K., but the property and right of possession were not to pass until payment of the price. O. & K. used the mill, &c., as a portable mill, for which they were designed, and then under the belief that they were the purchasers of certain land from the Canada Company through the company's agent, erected the mill, &c., thereon, so as to assume a permanent character. It appeared, however, that the agent had no power to sell, and the land was afterwards sold to the defendant. On the 12th November, 1883, prior to the defendant's purchase, the defendant took from O. & K. a mortgage on the land to secure an alleged indebtedness to him; and on the 15th November a chattel mortgage on the above chattels. The latter mortgage did not state the amount of the indebtedness; and the affidavit of bona fides was equally defective, as it merely stated that the mortgagors "are fully indebted to me," the mortgagee, "in a large

sum of money," no sum being mentioned. On the 27th November, on the boiler being exchanged for another one, O. & K. gave plaintiff a chattel mortgage thereon. There was a misdescription therein as to the number of flues in the boiler, and as to the land on which it was situated. The defendant having claimed the mill, &c., as against the plaintiffs:—Held, that the plaintiffs were entitled to recover damages not only for the goods owned by them, but also for the boiler under their chattel mortgage, although it was subsequent to the defendant's, the latter was void as against the plaintiffs, the amount of indebtedness existing or created by the mortgage not being mentioned therein, and in the affidavit of bona fides as required by the first and second sections of R. S. O. c. 119:—Held, also, that parol evidence was admissible to shew that the boiler in question was the one mortgaged. *The Stevens, Turner & Burns Foundry and General Manufacturing Co. (Limited) v. Barfoot*, 9 O. R. 692.—Cameron.

#### 2. Registration.

K. having become security for repayment by H. of \$600, an agreement in writing was entered into that in consideration thereof H. did assign to K. "all his right and claim to the goods and stock-in-trade in the store of H. to an amount sufficient to reimburse K. whatever he may pay in consequence of becoming such surety as aforesaid, and should there not be stock enough for that purpose in the store at such time, the balance after deducting the value of the said stock shall be made up of the book debts then on the books of H." This agreement was not registered. H. subsequently made an assignment for the benefit of his creditors to C., at which time only about \$20 worth of the stock was the same as had been in the store at the time of the said agreement, and K.'s administratrix brought this action against H. for repayment, and in default, for payment by C. out of the proceeds of the stock and book debts of H., as well as H. F. & Co., creditors of H. who had executed the assignment to C., being made parties defendant with H.:—Held, reversing the decision of Proudfoot, J., that, so far as the book debts were concerned as to which registration was unnecessary, the agreement was valid and binding as against the creditors as well as H. *Taylor v. Whittemore*, 10 Q. B. 440, cited and approved of; *Short v. Ruttan*, 12 Q. B. 79, not followed. *Kitching v. Hicks et al.*, 6 O. R. 739.—Chy. D.

Held, also, affirming the decision of Proudfoot, J., that though an assignee for the benefit of creditors could not take advantage of the want of registration, yet creditors themselves might, although not creditors by judgment and execution at the time of the assignment; and following *Parke v. St. George*, 2 O. R. 342, and *Merile Silver Co. v. Lee*, 2 O. R. 45, that the assignee did not prevent them from impeaching it.

Held, further, that the terms of the agreement were not sufficiently comprehensive to cover the substituted, renewed, or added stock in trade. *Id.*

See also *Robinson v. Cook*, 6 O. R. 590.

The defendant of McL. under plaintiffs, the assignees under by McL. to the indebtedness. Afterwards McL. the goods as subsequently the McL. to take possession of the Co. attempt to take sufficient to satisfy the defendant was *Parke v. St. George* and *McKellar et al.*

An appeal from Bench Division. *Scribner v. Melson* of the judgment divided in opinion. J. A., and Gal. goods was not on and complete of actual and continuing was therefore void. S. O. c. 119, s. 1. *Rose, J.*—The immediately following which must continue have been continuingly resumed his property goods in question in reality as clerical. *Scribner v. Kinloch*.

Held, reversing. 9 O. R. 314, that an actual and continuing to defeat the execution. *Parke v. St. George*, *Kinloch*, 12 A. R. *v. Hovey et al.*, 1

See *Commercial* *Corcoran*, 6 O. R. *v. Davidson*, et al.

#### IV. DIS

In an action against the defence was taken subsequently, on his by him, and which horn Lake, Sandy covered by a chattel goods in which mortgaged "now in and upon" the latter mortgage, "now in the goods to which which were then the mortgage, and could not include *Belley v. Hall*, 7 O.

## 3. Change of Possession.

The defendants seized goods in the possession of McL. under an execution against him; and the plaintiffs, the Bank of M., claimed the goods as assignees under an unregistered bill of sale given by McL. to one F., as collateral security for indebtedness. There was no change of possession. Afterwards McL. agreed with the bank to hold the goods as tenant at will at a rental, and subsequently the bank made an ineffectual attempt to take possession:—Held, (reversing the judgment of the County Court of Lambton), that the attempt to take possession of the goods was not sufficient to satisfy R. S. O. c. 119, and that the defendant was therefore entitled to succeed. *Parkes v. St. George*, 10 A. R. 496, distinguished. *McKellar et al. v. McGillibon*, 12 A. R. 221.

An appeal from the judgment of the Queen's Bench Division in this case, reported sub. nom. *Scribner v. McLaren*, et al., 2 O. R. 265, by reason of the judges in this court being equally divided in opinion, was dismissed. Per Burton, J. A., and Galt, J.—The sale of the debtor's goods was not only accompanied by an immediate and complete delivery, but was followed by an actual and continued change of possession; and was therefore valid as against creditors under R. S. O. c. 119, s. 5. Per Patterson, J. A., and Rose, J.—The actual change which must immediately follow the sale is the same change which must continue; and it could not be said to have been continued where the vendor apparently resumed his place in the shop containing the goods in question, one day after the sale, though in reality as clerk or salesman for the purchaser. *Scribner v. Kinloch et al.*, 12 A. R. 367.

Held, reversing the judgment of Ferguson, J., 9 O. R. 314, that in this case there had been such an actual and continued change of possession as to defeat the executions against the company. *Parkes v. St. George*, 10 A. R. 496, and *Scribner v. Kinloch*, 12 A. R. 367, followed. *Whiting et al. v. Hovey et al.*, 13 A. R. 7.

See *Commercial National Bank of Chicago v. Corcoran*, 6 O. R. 527, p. 53; *Dominion Bank v. Davidson*, et al., 12 A. R. 90, p. 57.

## IV. DESCRIPTION OF GOODS.

In an action against a sheriff for false return the defence was that the goods seized and subsequently, on his being indemnified, abandoned by him, and which were on Bald Lake, Buckhorn Lake, Sandy Creek, and Squaw River, were covered by a chattel mortgage to a bank, the goods in which mortgage were described as being "now in and upon the waters of Mud Lake, Pigeon Creek, Pigeon Lake, Sturgeon Lake, and Sturgeon River, and the shore adjacent thereto." The evidence shewed that the former waters were well known as such, and as distinct from and forming no part of the latter, and that no part of the goods seized had ever been "in and upon" the latter:—Held, that the words in the mortgage, "now in and upon," expressly limited the goods to which they referred to those goods which were then upon the waters mentioned in the mortgage, and the shore adjacent thereto, and could not include the goods seized. *Donnelly v. Hall*, 7 O. R. 581—Q. B. D.

The president and secretary of an incorporated company, which was insolvent, executed an assignment to trustees for creditors of all the real estate of the company, and also of "All and singular the personal estate and effects, stock in trade, goods, chattels, rights, and credits, fixtures, book debts, notes, accounts, books of account, choses in action, and all other the personal estate and effects whatsoever and wheresoever, and whether upon the premises where the company's business is now carried on or elsewhere, which the company is possessed of or entitled to in any way whatever," which assignment was duly filed on the following day, and the business was continued as before until the 23rd of the same month, when letters were written by the secretary in which the trustees were mentioned, and five days later Whiting, one of the trustees, demanded and received from the manager of the company the keys of the post office box, and directed the manager to keep the concern running. On the 4th of October the first of several executions against the goods of the company was sued out and placed in the sheriff's hands:—Held, affirming the judgment of Ferguson, J., 9 O. R. 314, that the description of the goods was not sufficient within the meaning of R. S. O. c. 119, s. 23. *Whiting et al. v. Hovey et al.*, 13 A. R. 7.

Semble, A description of property in a bill of sale or chattel mortgage as "the stock-in-trade" of the grantor in a specified locality, such as his store or warehouse in such a place or street is sufficient. *Nolan v. Donnelly*, 4 O. R. 440, observed upon. *McCall v. Woolf*, Sup. Ct. Can. [not yet reported] followed. *Id.*

## V. CONSIDERATION AND BONA FIDES.

Part of the consideration of the mortgage was covered by a draft drawn by the mortgagee a merchant in the course of business, on the mortgagor, his customer, and discounted at a bank:—Held, that the mere fact of the draft having been discounted at the bank would not justify the Court in assuming that the debt represented by the draft was paid, and that the remedy on the draft was to be alone looked to; and therefore that the amount of the indebtedness in the mortgage could not be said to be untruly stated. *Meriden Silver Plating Co. v. Lee*, 2 O. R. 451, commented on. *Hepburn v. Park et al.*, 6 O. R. 472.—Osler.—C. P. D.

Held, following *Hepburn v. Park et al.*, 6 O. R. 472, that the fact that the notes in question were held by the mortgagees' bankers on discount did not invalidate the mortgage. *Hymen v. Cathbertson*, 10 O. R. 443—Q. B. D.

Q. and A. carrying on business as licensed victuallers were indebted to the defendant S., a wine merchant, to the amount of \$1,551.66; and being desirous of obtaining further advances to aid them in carrying on their business, applied to S. therefor, which S. agreed verbally to make upon receiving security for such advances as well as such prior indebtedness, and Q. and A. accordingly on the 24th of January, 1882, executed a mortgage to S. on all their stock-in-trade, securing \$2,400, S. agreeing to make the further advances in money and goods, as they should require them in the course of their business, and he did in fact between the date of the execution

of the mortgage and the 3rd of March following, advance to them \$300 in money and goods, and the balance of the further advance was ready to be given to them at any time during that period. The affidavit of indebtedness in the sum of \$2,400 was in the usual form, and the mortgage was duly registered. On the last mentioned date Q. and A. executed a deed of assignment for creditors to the defendant C. of all their estate, whereupon S., treating this assignment as a breach of the covenant against selling or parting with possession of the goods, seized them in the hands of the assignee and sold the same, undertaking to hold the proceeds subject to the order of the court. Thereupon the plaintiff, a simple contract creditor of Q. and A., upon a demand due at the date of the mortgage, instituted proceedings seeking to recover payment of his claim for \$101.94 and interest, and also seeking, on behalf of all the creditors of Q. and A., to have the mortgage declared void, and the amount realized on the sale of the goods paid to the assignee:—Held, that even if the fact of the mortgage being expressed on the face of it to be made for a sum greatly in excess of what it was proved was due, was such an objection as might render the security void under R. S. O. c. 119, as against creditors, yet it being clearly shewn that everything between the parties in connection therewith was done bona fide, and there being no creditor in a position to seize the goods if the mortgage were set aside, the plaintiff could not succeed, and the court (Patterson, J. A., dissenting,) reversed the judgment of the court below, (2 O. R. 342.) Per Patterson, J. A., the mortgage and the affidavits accompanying it, though in their form and statements complying with all that is prescribed by the statute, being untrue in fact rendered the security void. Per Burton, J. A.—Although no ground was shewn for impeaching the transaction as a fraudulent preference, the mortgage under the Chattel Mortgage Act, R. S. O. c. 119, was invalid as against creditors who were in a position to attack it, which the plaintiff here was not, and as any informalities in the transaction were cured by the mortgagee having taken possession of the property, the plaintiff could not maintain the action. Per Osler, J. A.—The agreement between the mortgagors and mortgagee might be looked upon as having been really one for a present advance, though the amount was to be paid out to them as they required it. It was not necessary therefore that it should be set forth in the mortgage under sec. 6 of the Chattel Mortgage Act, R. S. O. c. 119. Barker v. Leeson, 1 O. R. 114, dissented from, per Burton, J. A. *Parkes v. St. George*, 10 A. R. 496.

See also *Furlong v. Reid*, 12 O. R. 607.

#### VI. WHO MAY IMPEACH.

The plaintiffs took a chattel mortgage from W., who the next day assigned to the defendant in trust for the benefit of his creditors. The defendant was not a creditor, and before any creditor had been informed of the assignment the plaintiffs, who had omitted to register their mortgage, demanded of the defendant the goods contained in it, which was refused, whereupon this action was brought. Upon the application of the defendant, with the consent of M., a creditor of W., the master in chambers ordered M.

to be added as a party defendant, in order to test the validity of the plaintiffs' mortgage:—Held, affirming the order of Galt, J., who rescinded the master's order, that the defendant was not entitled to the order, for when the plaintiff demanded the goods the creditors had no right, and they could not by a subsequent assent make good their claim under the assignment. *Hyman v. Bourne*, 5 O. R. 430—C. P. D.

A judgment or execution creditor is entitled to impeach a chattel mortgage on the ground of an irregularity or informality in the execution of the document, or by reason of its non-compliance with the provisions of the Chattel Mortgage Act (R. S. O. c. 119); but a creditor who is not in a position to seize or lay on an execution on the property, cannot maintain an action to have the instrument declared invalid. A creditor in that position can only maintain such a proceeding where the security is impeached on the ground of fraud. *Parkes v. St. George*, 10 A. R. 496.

Held, following *Parkes v. St. George*, 10 A. R. 496, that the plaintiffs, not being execution creditors, could not maintain an action to set aside the mortgage on the ground that the debt was incorrectly stated therein. *Hyman v. Cuthbertson*, 10 O. R. 443—Q. B. D.

See *Kitching v. Hicks et al.*, 6 O. R. 739, p. 60; See also *Macdonald et al. v. McCall et al.* 12 A. R. 493.

#### BOARDING HOUSE.

J. and his wife took rooms in premises kept by defendant, R. A., called the "Shandon House," partly furnishing them and agreeing to pay \$50 per month for rooms and board. Subsequently they rented from plaintiff a piano. They left the "Shandon House" in debt for board and lodging to R. A., who thereupon detained the piano, which was claimed by the plaintiff:—Held, that the relation between the defendant R. A. and J. was not that of inn-keeper and guest, but of boarding-house keeper and boarder:—Held, also, that as the piano was not the property of J. and his wife, defendant had no lien on it for board and lodging under R. S. O. c. 147. *Newcombe v. Anderson et al.*, 11 O. R. 665—Q. B. D.

Quere, whether the house kept by defendant R. A. was an "inn" within the meaning of R. S. O. c. 147, s. 1. *Id.*

#### BOND.

DEBENTURES. — See DEBENTURES. — RAILWAYS AND RAILWAY COMPANIES.

By husband and wife. See *Glass v. Burt et al.*, 8 O. R. 391.—H. & W.

#### BONUS.

I. TO MANUFACTURERS — See MUNICIPAL CORPORATIONS.

#### II. TO RAILWAY COMPANIES.

#### I. DESCRIPTION. II. PARTY WA. III. BY WATER COURSES.

T. was the owner of lot 8 adjoining lot 7, which formerly belonged to the same person. T. and S. were surveyors to a surveyor who went to the line between the two lots, and claimed his northern lot as an old fence, and the land between the line and the line of the boundary was his boundary line. The average line of the lot met the post. H. objected. A few architect and build in the presence of the surveyor's map. The surveyor's map was coming immediately, and T. to the line on the first time that the boundary so marked house were up and a considerable money had. Held, that C. was the line run by the line. *Brassett v. Carter*, 10

In 1861, W. D. P. bounded on the south by William street, and running the southerly portion of the plan, which plan showed the boundary between the plaintiff's lot and the defendant's lot. The boundary was laid out in stakes or other marks, and the boundaries of the land so laid out. The remaining land to the south of the boundary was laid out in a plan, and a street was laid out in the limit of the first plan of the second plan. However, of this street was greater than the first plan, and the parties appeared to have been street and the first plan were actually strong, J. 1. The plaintiff's and defendant's boundaries at a point

## II. TO RAILWAYS—See RAILWAYS AND RAILWAY COMPANIES.

### BOOKS.

See COPYRIGHT.

### BOUNDARY.

#### I. DESCRIPTION OF LAND—See DEED.

#### II. PARTY WALLS—See BUILDINGS.

#### III. BY WATER—See WATER AND WATER COURSES.

T. was the owner of lot 9, and C. was the owner of lot 8 adjoining it on the south. Both lots had formerly belonged to one person, and there was no exact indication of the true boundary line between them. T. being about to build, employed a surveyor to ascertain the boundary. The surveyor went to the place, and asked C. where he claimed his northern boundary was. C. pointed out an old fence, running part of the way across the land between the lots and an old post, and said the line of the fence produced to the post was his boundary line. The surveyor then took the average line of the fence and produced it till it met the post. He staked out this line, C. not objecting. A few days afterwards T., with his architect and builder, went on the ground, and in the presence of C., the builder again marked out the boundary by means of a line connecting the surveyor's marks, C. not objecting. Excavating was commenced according to that line immediately, and T.'s house was built according to the line on the extreme verge of T.'s land. The first time that C. raised any objection to the boundary so marked was when the walls of T.'s house were up and ready for the roof and considerable money had been expended in building:—Held, that C. was estopped from disputing that the line run by the surveyor, was the true line. *Grissett v. Carter*, 10 S. C. R. 105.

In 1861, W. D. P., who owned a piece of land bounded on the south by Queen street, on the east by William street, on the west by Dummer street, and running north some distance, laid out the southerly portion into lots depicted upon a plan, which plan showed the boundary line between the plaintiff's and defendant's lots to be exactly 600 feet from Queen street. There were no stakes or other marks on the ground to indicate the boundaries of the lots or the extent of the land so laid out. Many years afterwards the remaining land to the north of the parcel so laid out, was laid out in lots so depicted on another plan, and a street was shown between the northerly limit of the first plan and the southerly limit of the second plan. The actual distance, however, of this street from Queen street was greater than the first plan on its face showed it to be, and the parties owning lots on the first plan appeared to have taken up their lots as if Queen street and the street on the north of the first plan were actual limits of the plan. Per Strong, J., 1. The true boundary line between the plaintiff's and defendant's lots was a line commencing at a point 600 feet from Dummer

street, as measured on the ground at the time when the plan was made; but in the absence of evidence showing a measurement on the levelled street, that point could not be accepted as the true point of commencement of the boundary in question. 2. Inasmuch as the conveyances to the parties were made according to the first plan, the second plan could not be invoked to aid in ascertaining the limits of the lots so conveyed. *Id.*

### BREACH OF PROMISE OF MARRIAGE.

See HUSBAND AND WIFE.

### BRIBERY.

See CRIMINAL LAW—PARLIAMENT.

### BRIDGE.

See RAILWAYS AND RAILWAY COMPANIES.

Liability of County for repair. See *In re the Corporations of the Townships of Moulton and Canborough and the Corporation of the County of Haldimand*, 12 A. R. 503.

### BRITISH NORTH AMERICA ACT 1867.

See CONSTITUTIONAL LAW.

### BROKER.

The plaintiff pledged with the defendants, certain shares of bank stock, as security for a loan under an agreement in writing, providing, that he was to keep up a cash margin of not less than 10 per cent. above the market price of the stock, and authorizing the bank, in the event of default, "to sell or dispose of the said security without notice, and to apply the proceeds in liquidation of the said advance." The plaintiff claimed that before default was made, the bank wrongfully loaned or sold his stock without his knowledge or consent; and that he was entitled to credit for the amount realized, and to a return of interest paid, and damages for being compelled to give additional security. The defendants alleged that although the stock was transferred backwards and forwards by way of loan, it was never sold until default was made:—Held, that if the stock was sold before default made, such sale was tortious, and following *ex parte Dennison*, 3 Ves. 552, that a loan of the stock was a sale; and that the plaintiff might elect, either to claim damages, or affirm the sale and claim the proceeds and profits made by the bank; one element of the measure of damages being, the highest point of the stock market between the conversion and the next default. But that if default was made, the bank was entitled to sell the stock without notice; but only for the purpose of liquidating the advance, and that credit must be given for the proceeds, at the current rates of the days on which the transfers were made, until all the shares had



been transferred. *Carnegie v. The Federal Bank of Canada*, 5 O. R. 418.—Boyd.

Semhle, that inasmuch as it appeared that the defendants held at the date of the loan 160 shares of the bank in question: and inasmuch as the particular shares were not identified or earmarked in any way, it could not be considered proved that the defendants had not 160 shares applicable to the plaintiff's loan on the date in question. *Carnegie v. The Federal Bank of Canada*, 8 O. R. 75.—Boyd.

The defendants assumed a contract made by the plaintiff with one F., a broker, under which F. was to purchase and carry for the plaintiff 500 shares of Federal Bank stock on payment by plaintiff of a percentage on the purchase money of the stock called "margin," and the plaintiff was to keep up his margins in case of a fall in the value of the stock; and to enable F. to carry the stock, a time loan was also arranged for the balance of the purchase money, on which the plaintiff was to pay 8 per cent. It appeared that no stock had ever been purchased for the plaintiff, and the defendants never had, and did not carry any stock for the plaintiff, but were, as it is termed, "short" on this stock:—Held, that the defendants having failed to carry out the agreement to carry the stock for the plaintiff, the plaintiff was entitled to recover back from the defendants the money paid as margin, interest, &c., as money had and received to the plaintiff's use. *Sutherland v. Cox et al.*, 6 O. R. 505—C. P. D. Affirmed by the Court of Appeal, 13 A. R. 525.

The defendants set up an alleged custom and usage of the stock exchange, that where a broker employed to purchase stock for a customer on margin he is at liberty to be himself the seller and nominal pledgee of the stock, and to charge a commission as if a real sale had been effected, although at the time he may not be owner of a single share; and that the broker fulfils his obligation, if he is prepared at any time to deliver the stock to his customer:—Held, that no such custom could prevail; for not only would it be directly opposed to the law which regulates the transactions between broker and employer, but it has this further defect, that it substitutes the personal liability of perhaps an insolvent broker for the real security of the stock. *Id.* See next case.

The plaintiff, a broker, pledged certain stock with the defendants, brokers, for advances, and it was agreed that the plaintiff might call for his stock or the defendants for their money on two days' notice. The defendants being in need of that stock immediately used it for the purpose of filling their own engagements. Subsequently the defendants alleged that the plaintiff was in default, and the plaintiff, not being aware that they had disposed of his stock, gave them his promissory notes for the amount claimed by the defendants. He subsequently discovered that they had sold the stock. The defendants set up in defence to this action for the wrongful sale an alleged custom of brokers that upon stock being pledged to a broker he might use it as his own, being ready to return to the pledgee when called upon an equal number of shares of the same stock:—Held, that no such custom was proved, nor would such a custom be valid; that the par-

ties might have agreed to be bound by such manner of dealing, but in this case no such agreement was proved. *Mara v. Cox et al.*, 6 O. R. 359.

Held, also, that the defendants might lawfully have re-pledged the stock to enable them to raise the advances to the plaintiff, but that the sales and other dispositions of the stock by the defendants without notice to the plaintiff, and when he was not in default, were wrongful, and that the plaintiff was entitled to recover from the defendants the prices at which they sold the stock. *Id.*

The jury found that the settlement which resulted in the plaintiff giving notes to the defendants was made by him with full knowledge of his rights, but under pressure, and on this and other findings a verdict was returned for the defendants. The court, being of opinion that the plaintiff was entitled to a verdict but for this finding, and that the finding was against law and evidence, directed a new trial. *Id.*

A firm of brokers purchased twenty shares of bank stock for the defendant, the latter agreeing to repay to the former the price paid therefor on demand with interest, the brokers to hold the stock as collateral security and receive a ten per cent. margin and one quarter per cent. commission. The brokers took the stock in their own names, and then transferred it to a loan company together with other stock of the same character, the transfer by them, though absolute in form, being in fact a pledge to secure the repayment of a much larger amount than the sum payable by the defendant. The pledge had no reference to the transaction with defendant, but was for the brokers' own purposes. The defendant was not informed of the transfer, and calls for further margins were made from time to time as the stock fell. On the 27th June, 1884, the brokers suspended payment, at which date the stock had fallen considerably; and on the 26th December they made an assignment for the benefit of creditors to the plaintiff. Neither at the time of the suspension or assignment, was any unpledged or unhypothecated stock held for or by the brokers, nor was any transferred to the plaintiff, there being only a right in him to redeem any stock undisposed of by the pledgees. On the 4th August, 1885, after the stock had, by legislative enactment, been reduced to one-half its original par value, or from \$100 to \$50 per share, the plaintiff offered to transfer twenty shares of the reduced stock, which the defendant refused to accept. The plaintiff then brought this action against defendant to recover the alleged balance due on the stock:—Held, there could be no recovery, for that the delivery of the stock and payment of the price were concurrent acts, and the brokers were in a position after the time of insolvency to deliver the same, while at the time of the plaintiff's offer there was no stock of the nominal value per share of that which the brokers purchased for the defendant. *Clarkson v. Snider*, 10 O. R. 561—C. P. D.

## BUILDING CONTRACT.

- I. CONTRACT—See WORK AND LABOUR.
- II. MECHANICS' LIEN—See LIEN.

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Sutherland v. Hughes*,

- I. PARTY WALL.
- II. MISCELLANEOUS.
- III. BUILDING AND LABOUR.
- IV. COVENANTS AND TENANTS.

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## BUILDING SOCIETY.

*L. Cie de V.*, a building society incorporated under Con. Stats. L. C. c. 69, by its by-laws, on the 21st August, declared that the principal object of the society was to purchase building lots, and to build on such lots cottages costing about \$1,000 each for every one of its members. In order to obtain its object the company, through its directors, obeying the instructions of the shareholders, on the 7th October, 1874, purchased the particular lots described in the by-laws and contracted for the building of twenty-four cottages at \$1,250 each, the amount that each of the shareholders had agreed to pay. A year elapsed, during which the cottages were built and drawn by lot for distribution among the members. On the 11th October, 1875, the vendors of the lots and contractors for the building of the cottages borrowed money from the Dominion Building Society, and transferred as collateral security the moneys due them by the appellants in virtue of the deeds of purchase and building contract. The appellant company accepted the transfer and paid some moneys on account, and finally a deed of settlement acte de reglement de compte was executed between the two companies, upon which was based the suit by H., the respondent, as assignee of the Dominion Mortgage Loan Company, (which name was substituted for that of "The Dominion Building Society," by 40 V. c. 80, (Dom.) against the appellants. The question argued on the appeal was whether the purchase of the lots and contract for building entered into by the directors was intra vires of the appellant company: Held, affirming the judgment of the court below, that as the transaction in question was for the purpose of carrying out the objects of the society in strict accordance with its views, it was not ultra vires. (Strong and Gwynne, JJ., dissenting.) *Compagnie de Villes du Cap Gibault v. Hughes*, 11 S. C. R. 537.

## BUILDINGS.

## I. PARTY WALLS, 69.

## II. MISCELLANEOUS CASES, 70.

## III. BUILDING CONTRACT—See LIEN—WORK AND LABOUR.

## IV. COVENANTS IN LEASES.—See LANDLORD AND TENANT.

## I. PARTY WALLS.

The plaintiff was the surviving trustee under the will of one J. B. of certain land, on which was erected a two storey brick house, the westerly wall of which formed the boundary of one L.'s land, immediately adjoining the plaintiff's on the west. L. leased to F., who erected thereon a large brick building, using the plaintiff's westerly wall as a party wall, inserting joists therein, and building thereon so as to raise it two stories higher, thereby weakening the plaintiff's wall. F. mortgaged to a building society, who, on default, sold to the defendant:—Held, that the plaintiff, under the Ontario Judicature Act, rule 95, was entitled to maintain

an action as representing the estate, without making the cestui qui trust parties; and that he was entitled to a decree that the defendant should desist from further using the wall built on the plaintiff's wall, or the ends of the joists which he had placed therein, but not to a direction that the defendant should pull down such wall, which the defendant had not erected: Held, also, that the plaintiff was entitled to recover as damages the expense of removing such wall, so erected on his wall, and the damages occasioned by his wall being weakened, but not damages for the loss of a sale of the property by reason of the erection. *Brooke v. McLean*, 5 O. R. 209—C. P. D.

See *Wray v. Morrison et al.*, 9 O. R. 180, *infra*. See also *Brooks v. Conley et al.*, 8 O. R. 549; *Kenny v. Mackenzie*, 12 A. R. 346; *Imperial Bank of Canada v. Metcalfe*, 11 O. R. 467.

## II. MISCELLANEOUS CASES.

In 1883 M. W. being seised of certain lands, conveyed half thereof to G. W. in fee, describing the same by metes and bounds, and afterwards died having devised the other half to M. There was a house on the lands in question so situate that half of it was on the portion granted to G. W., and half on the portion devised to M. No specific mention of the house was made either in the deed to G. W. or in the will. M. now commenced, in defiance of G. W.'s protests, to pull down the half of the house situate on the land devised to her, and G. W. applied in the present action for an injunction to restrain the same:—Held, that he was entitled to the relief claimed. *Wray v. Morrison et al.*, 9 O. R. 180.—Ferguson.

Liability for injury occasioned by ice and snow falling from the roof of a house. See *Landreville v. Gouin*, 6 O. R. 455.

Action for damages occasioned to a street railway by the breaking down of the machinery used in removing a building from one part of the city to another, when crossing the track of the railway, and so impeding their traffic. See *Toronto Street Railway Company v. Dollery*, 12 A. R. 679.

Per O'Connor, J., a tug is not a building within the meaning of the 10th statutory condition of an insurance policy. *Mitchell v. The City of London Fire Ins. Co. (Limited)*, 12 O. R. 706.

Duty of architect in superintending erection of buildings. See *Badgley v. Dickson*, 13 A. R. 494, p. 15.

## BY-LAWS.

## I. MUNICIPAL CORPORATIONS—See MUNICIPAL CORPORATIONS.

## II. TAVERN AND SHOP LICENSES—See INTOXICATING LIQUORS.

No seal was affixed to a municipal by-law, but an impression of the seal was made thereon:—Held, sufficient. *Croome and the Municipal Council of the City of Brantford*, 6 O. R. 188.—Rose.



As to power to repeal by-laws. See *Wright v. Incorporated Synd of the Diocese of Huron*, 11 S. C. R. 95, p. 79.

### CAB STANDS.

See MUNICIPAL CORPORATIONS.

### CALLS.

ON STOCK—See CORPORATIONS.

### CANADA TEMPERANCE ACT 1878.

See INTOXICATING LIQUORS.

### CANCELLING STOCK.

See CORPORATIONS.

### CAPIAS.

See BAIL.—CAPIAS AD SATISFACIENDUM.

### CAPIAS AD SATISFACIENDUM.

A defendant arrested and imprisoned under a ca. sa. is a debtor in close custody in execution within the meaning of R. S. O. c. 69. *Hay v. Paterson*, 11 P. R. 114.—Rose.

A judge in chambers has no power to rescind his own order for a writ of ca. sa. or to discharge the defendant from custody after the order has been acted upon. *McNabb v. Oppenheimer*, 11 P. R. 214.—Rose.

A local judge of the high court has no power to order the discharge of a defendant held in custody under a ca. sa. issued out of the high court of justice. *Cochrane Manufacturing Company v. Lamon*, 11 P. R. 351.—Galt.

A sheriff upon arresting a judgment debtor under a ca. sa. thereby becomes at once entitled as against the execution creditor to full poundage on the amount of the execution. *McNabb v. Oppenheimer*, 11 P. R. 348.—Galt.

Held, (reversing the judgment of the county judge), that proceedings to fix bail cannot be maintained on a writ of ca. sa. which is made returnable immediately after the execution thereof; for such purpose it is necessary that the writ should be returnable on a day certain. (Hagarty, C. J. O., dissenting.) *Proctor v. Mackenzie et al.*, 11 A. R. 486.

### CARRIERS.

#### I. LIABILITY, 72.

#### II. DEMURRAGE—See DEMURRAGE.

#### III. BY RAILWAYS—See RAILWAYS AND RAILWAY COMPANIES.

#### IV. BY WATER—See SHIP.

### I. LIABILITY.

The plaintiff, a dealer in grains, &c., in Canada, consigned to his correspondent in Liverpool, England, a quantity of clover seed, and delivered the same to the agent of the defendant company at Waterford in Ontario, for the purpose of being carried to Liverpool, receiving from such agent the usual bill of lading. Before the seed had left the American frontier for the sea-board the plaintiff desired to change the consignee, and applied to one B., an agent of the company, resident in Toronto, for that purpose who, on payment of the additional freight, granted a fresh bill of lading, agreeing to carry the seed to London. The change of destination was duly communicated by B. to the agent of the company at Black Rock, whose duty it was to have made the necessary changes in the instrument securing the passage of the goods duty free through the United States, but this he omitted to do, in consequence of which the seed went to Liverpool, so that instead of being delivered in London on the 12th. February, it did not reach there until the 23rd of March, too late for the sowing trade, so that the seed had to be sold at a heavy loss.—Held (affirming the judgment of the court below, 1 O. R. 47.) (1) That the Toronto agent was authorized to make the change in the destination of the seed, and (2) that the defendants were bound to indemnify the plaintiff against the loss sustained by reason of the fall in the market value of the seed, together with the additional sum paid for the freight from Liverpool to London.—Sembler, that the same rule applies where the goods are not intended for immediate sale at their place of destination. *Monteith v. The Merchants Despatch and Transportation Company*, 9 A. R. 282.

The plaintiff agreed with the M. D. T. Co. for the conveyance of butter from London in Ontario to England. The butter was carried from London to the Suspension Bridge by the G. W. Ry. Co., from the Bridge to New York by the N. Y. C. R. R. Co., and from New York to England by the G. W. Steamship Co., bills of lading being given at London to the plaintiff by a person who signed as agent severally and not jointly for the M. D. T. Co., the G. W. Ry. Co., and the G. W. Steamship Co. The plaintiff sued for damage sustained by the butter, joining the three companies as defendants under the O. J. Act s. 91. It appeared that the damage occurred while the butter was on a lighter of the N. Y. C. R. R. Co. in New York harbour, and before it was actually delivered at the pier or on board a vessel of the Steamship Co.—Held, that the M. D. T. Co. by virtue of its through contract was liable for the damage; that the responsibility of the Steamship Co. had not attached until after the damage was done, one of the terms of the bill of lading being that "this contract is executed and accomplished and the liability of the G. W. Ry. and its connections as common carriers thereunder terminates on the delivery of the goods or property to the steamer or Steamship Company's pier at New York, where the responsibility of the Steamship Co. commences, and not before; and that inasmuch as the butter had been received in England by the consignees without objection, the Steamship Company would have been protected by conditions which by the bill of lading were made part of the contract, one of which was to the same effect as the condition in

question in *Quare*, by *Pe* and the *G. W.* held jointly *of Osler, J. A* the Merchant *Hately et al.* *portation Com*

#### I. IS CIVIL

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#### III. RETURNS

A motion for into this court the Minister of sion therein, of to have a pata nce with the Act of 1872 w phone Company

This case was judge, who gav plaintiff, but f judgment to a defendants to m In the meanti quired notice; not thus wait in their favour, a writ of certior Wesley, 8 Bathie, 2 U. C. Reeve, 5 P. R. The United Tor O. R. 138—Q. 1

#### II. TO

Held, that a move proceeding Court from a po peace after com purpose of mov tion of evidence against evidence the court and no giant v. *Richard*

The writ of of section 28 of 32- *Richardson*, 11 P

Held, that the Vict. c. 49, (Do tions and applie

question in *Moore v. Harris*, 1 App. Cas. 318; *Quære*, by Patterson, J. A., if the M. D. T. Co. and the G. W. S. S. Co. could properly have been held jointly liable in this action. The judgment of Osler, J. A., 4 O. R. 723, as to the defendants the Merchants Despatch Company was affirmed, *Hately et al. v. The Merchants Despatch Transportation Company et al.*, 12 A. R. 201.

### CATTLE.

See ANIMALS.

### CERTIORARI.

#### I. IN CIVIL CASES, 73.

#### II. TO BRING UP CONVICTIONS.

##### 1. Generally, 73.

##### 2. Under Canada Temperance Act 1878— See INTOXICATING LIQUORS.

#### III. RETURN OF WRIT, 74.

#### I. IN CIVIL CASES.

A motion for a writ of certiorari to bring up into this court all the proceedings, &c., before the Minister of Agriculture, including his decision therein, on an application made before him to have a patent declared void for non-compliance with the provisions of sec. 28 of the Patent Act of 1872 was refused. *In re the Bell Telephone Company*, 9 O. R. 339—C. P. D.

This case was tried before the Division Court judge, who gave his decision in favour of the plaintiff, but formally reserved the giving of judgment to a subsequent day, to enable the defendants to move for prohibition or certiorari. In the meantime the defendants gave the required notice:—Held, that the defendants could not thus wait and take the chances of a decision in their favour, and finding it adverse, apply for a writ of certiorari and properly obtain it. *Black v. Wesley*, 8 U. C. L. J. 277; *Gallagher v. Bathie*, 2 U. C. L. J. N. S. 73, and *Holmes v. Reeve*, 5 P. R. 58, followed. *In re Knight v. The United Townships of Medora and Wood*, 11 O. R. 138—Q. E. D. Affirmed on Appeal.

#### II. TO BRING UP CONVICTIONS.

##### 1. Generally.

Held, that a defendant is not entitled to remove proceedings by certiorari to a Superior Court from a police magistrate or a justice of the peace after conviction, or at any time, for the purpose of moving for a new trial for the rejection of evidence, or because the conviction is against evidence, the conviction not being before the court and no motion made to quash it. *Regina v. Richardson*, 8 O. R. 651—Q. B. D.

The writ of certiorari is not taken away by section 28 of 32-33 Vict. c. 32. (Dom.) *Regina v. Richardson*, 11 P. R. 95.—Osler.

Held, that though not expressly so enacted, 49 Vict. c. 49, (Dom.,) is retrospective in its operations and applies to convictions whether made

before or after the passing of the Act, and that under sec. 7 the right to certiorari is taken away upon service of notice of appeal to the Sessions, that being the first proceeding on an appeal from the conviction. *Regina v. Lynch*, 12 O. R. 372.—Wilson.

The defendants having been convicted by a police magistrate of an offence against the provisions of C. S. C. c. 95, appealed to the Quarter Sessions, and the convictions were affirmed. Defendants now applied for a certiorari to remove the convictions, notwithstanding that 32 & 33 Vict. c. 31, s. 71, (Dom.,) as amended by 33 Vict. c. 27, s. 2, (Dom.,) expressly takes away the right to certiorari where there has been an appeal to the Sessions:—Held, that where the magistrate has jurisdiction over the offence charged, and the right to certiorari is taken away, the court cannot examine the evidence to see if the magistrate had jurisdiction to convict, and the certiorari was refused. *Regina v. Scott et al.*, 10 P. R. 517.—Rose.

Held, that since the passing of the dominion statute 49 Vict. c. 49, s. 8, there is no longer necessity for a defendant, on removal by certiorari of a conviction against him, to enter into the recognizance as to costs formerly required. *Regina v. Seavey*, 12 O. R. 391.—Wilson.

See also *Regina v. Sparham*, 8 O. R. 570.

#### III. RETURN OF WRIT.

Held, that an amended conviction cannot be put in after the return of a writ of certiorari. *Regina v. Mackenzie*, 6 O. R. 165.—Rose.

Held, that on the return of a writ of certiorari, a recognizance is unnecessary. *Regina v. Nunn*, 10 P. R. 395.—Rose.

A magistrate can amend his conviction at any time before the return of the certiorari. See *Regina v. McCarthy*, 11 O. R. 657.

Held, that since the passing of the Dominion Statute 49 Vict. c. 49, s. 8, there is no longer necessity for a defendant, on removal by certiorari of a conviction against him, to enter into the recognizance as to costs formerly required:—Held also that the words "shall no longer apply" in sec. 8 mean that from the day of the passing of the statute the Imperial Act 5 Geo. II. c. 19, shall no longer apply, not that the Imperial Act shall cease to have application in Canada upon a general order being passed under sec. 6 of the Dominion Act. *Regina v. Seavey*, 12 O. R. 391.—Wilson.

### CHAMBERS, JUDGES'.

See PRACTICE.

### CHAMPERTY AND MAINTENANCE.

Where one having obtained an assignment of a judgment against a mortgagor brought an action in his own name against the mortgagee who had sold under the power of sale to make him account for certain surplus moneys left in his hands after such sale:—Held, that the plaintiff was entitled so to sue, and that such assignment of judg-

ment was not in contravention of the law respecting champerty and maintenance. *Harper v. Culbert et al.*, 5 O. R. 152.—Ferguson.

After the hearing and before the appeal was argued, a motion was made to strike the case out of the list, on the ground of maintenance, and it was shewn that the defendant, the Rev. J. P. D., did not wish to proceed with this suit; but that as he was pressed to do so by his vestry and churchwardens, he allowed his name to be used as appellant upon being indemnified by the latter as to costs. Per Boyd, C.—There was maintenance in the suit though not in the criminal sense, and the case should be struck out. Per Proudfoot, J.—There was no maintenance. The decree of Ferguson, J., was, however, varied by allowing the costs of all parties up to the hearing to come out of the fund. *Langtry v. Dunoulin*, 7 O. R. 644—Chy. D.

## CHANGING PLACE OF TRIAL.

See PLEADING.

## CHARITY.

DEVISE TO—See WILL.

There can be no marshalling of assets in favour of a charity. *Becher v. Houre*, 8 O. R. 328.—Ferguson.

## CHARTER PARTY.

See SHIP.

## CHATTEL.

I. GIFT OF—See GIFT.

II. HIRE OF—See HIRING.

III. MORTGAGE OF—See BILLS OF SALE AND CHATTEL MORTGAGES.

## CHATTEL MORTGAGE.

See BILLS OF SALE AND CHATTEL MORTGAGES.

## CHEQUE.

See BANKS.

A cheque given in settlement of losses at matching coppers is a note of hand given in consideration of a gambling debt within s. 53, sub-s. 3, R. S. O. c. 47, and such a security is void under 9 Anne c. 14, even in the hands of a bona fide holder for value. *In re Summerfeldt v. Worts*, 12 O. R. 48—Q. B. D.

## CHILD.

See INFANT—PARENT AND CHILD.

## CHOSE IN ACTION.

ATTACHMENT OF DEBTS—See ATTACHMENT OF DEBTS.

Held,—Rose, J., expressing no opinion on the point—that where an assignment of a mortgage on land was absolute in form, though as a matter of fact the assignor retained a right to part of the money, an action on the covenant in the mortgage must be brought in the name of the assignee. *Ward v. Hughes*, 8 O. R. 138—C. P. D.

While the defendants C. & E. were negotiating with the defendant J. for the purchase of his stock of goods, the plaintiffs presented to C. & E. an order upon them for part of the anticipated purchase money, which order they had obtained from J. in payment of a debt due by him to the plaintiffs. This order C. & E. refused to pay or accept. The sale was subsequently completed and the price paid in full to J.—Held, that no charge on the purchase money had thus been created, and payment therefore could not be enforced against C. & E. *Mitchell v. Goodall*, 5 A. R. 164, and *McMaster v. Garland*, 8 A. R. 1. observed upon and explained. *Brown et al. v. Johnston et al.*, 12 A. R. 190.

See also *Armstrong v. Farr*, 11 A. R. 186; *Friendly v. The Canada Transit Co.*, 10 O. R. 756; *Dymont v. The Northern and North West Ry. Co.*, 11 O. R. 343; *Galbraith v. Irving*, 8 O. R. 751.

## CHURCH.

I. CHURCH OF ENGLAND, 76.

II. TRUSTEES OF RELIGIOUS INSTITUTIONS, 80.

III. DEVISES TO—See WILL.

### I. CHURCH OF ENGLAND.

The Rev. J. H. being the incumbent of a parish in the Diocese of Ontario, which was endowed, and having acted in such capacity and performed the duties thereof for several years, discontinued the services in two other churches which were attached to his parish. A commission was issued by the Bishop under the Canon in that behalf of the Synod of the said Diocese No. 8, "To enquire into the causes which led to the closing of the said churches, and to report whether there was lawful excuse for the said Rev. J. H.'s discontinuance of the exercise of his ministerial offices in said churches, and to report whether there was sufficient *prima facie* ground for instituting further proceedings against the said Rev. J. H. as provided by said Canon." The commissioners reported that the churches had been closed "because the members of the church refused to attend and provide for the ministrations of the Rev. J. H. in these churches, that an estrangement existed between the said Rev. J. H. and his parishioners, and they de-

clined his mission of the commission of such a procedure and they decided of further proceedings there was ministerial use a *prima facie* proceedings against but they were duction of other that adduced, ings would not discipline under After the ma said Rev. J. H. eumbency, the seal, revoked, and appointed and the Synod J. H. the ann Up an action to compel the S He, that the second section with such an under section has the right of section thirteen power to cancel plaintiff, either trial by the Dioc tiff must succeed word "immora not restricted b ing particular o of the same nat well v. The Inco Ontario et al., 7

Certain land Crown, dated D B. R., and W. A benefit of the p forever, as a chu the inhabitants appurtenant to This patent was another, dated S to the same trus former patent, a much only of tl the purposes of a should be so app the said land as of the parishion the trusts and trusts were as fo same for the sole clergyman of the cessors appointed the Episcopal Ch land is appurtena with the assent of the rents due on use." \* \* \* and an incumber fees should conv and his successor to and for the trusts." Certain by another pater April, 1819, to W

clined his ministrations. But that in the opinion of the commissioners, the proofs adduced were not of such a nature as could be relied on to procure a conviction in an Ecclesiastical Court: and they declined to recommend the prosecution of further legal action, although they believed there was no hope of a restoration of his ministerial usefulness there, and that there was a *prima facie* ground for instituting further proceedings against him as provided by the Canon; but they were of opinion that without the production of other and much stronger evidence than that adduced, the institution of further proceedings would not result in a charge of breach of discipline under the said Canon being sustained. After the making of this report, and upon the said Rev. J. H. refusing to resign his said incumbency, the Bishop, by an instrument under seal, revoked, or purported to revoke, his license, and appointed the Rev. A. E. T. as his successor, and the Synod declined to pay him (the Rev. J. H.) the annual proceeds of the endowment. Upon an action being brought by the Rev. J. H. to compel the Synod to pay him such proceeds:—Held, that the offences (if any) came within the second section of the Canon; that any one charged with such an offence has the right to be tried, under section one, by the Diocesan Court, and has the right of appeal to the metropolitan, under section thirteen; that the Bishop had not the power to cancel and annul the license of the plaintiff, either without or for cause, without a trial by the Diocesan Court; and that the plaintiff must succeed:—Held also that the general word “immorality” as used in the Canon was not restricted by the words following, specifying particular offences, for such offences were not of the same nature as the general word. *Hallidwell v. The Incorporated Synod of the Diocese of Ontario et al.*, 7 O. R. 67.—Ferguson.

Certain land was granted by patent from the Crown, dated December 26th, 1817, to D. B., J. B. R., and W. A. as trustees, for the sole use and benefit of the parishioners of the town of York forever, as a churchyard and burying ground for the inhabitants of the said town of York, and appurtenant to the church then built thereon. This patent was surrendered to the Crown, and another, dated September 4th, 1820, was issued to the same trustees, reciting the terms of the former patent, and that it was intended that so much only of the said land as was necessary for the purposes of a churchyard and burying ground should be so appropriated, and that such part of the said land as was not so required for the use of the parishioners should be held upon and for the trusts and uses thereafter stated, which trusts were as follows:—“In trust to hold the same for the sole use and benefit of the resident clergyman of the said town of York, and his successors appointed or to be appointed rectors of the Episcopal Church therein to which the said land is appurtenant, to make lease of the same with the assent of the incumbent, and to receive the rents due or to grow due therefrom to his use.” \* \* \* and when a rectory was erected and an incumbent appointed \* \* \* “the trustees should convey to such incumbent \* \* \* and his successors forever as a corporation sole to and for the same uses and upon the same trusts.” Certain other lands were also granted by another patent from the Crown, dated 26th April, 1819, to W. D. P., J. B., and J. S., upon

trust to observe such directions, and to consent to and allow such appropriation and disposition of them, and to convey the same in such manner as should thereafter be directed by order in council. These lands were subsequently conveyed by W. D. P., J. B., and J. S. to the other trustees, D. B., J. B. R., and W. A., by deed, dated July 4th, 1825, reciting an order in council dated December 2nd, 1824, requiring the grantors to convey the said lands to the grantees for the use of the church and of the clergyman incumbent thereon for the time being (which recital was the only evidence of the contents of the order in council), “upon trust, nevertheless, that the grantees should hold the lands for the sole use and benefit of the resident clergyman of the town of York, and his successors appointed or to be appointed incumbent of the parsonage or rectory of the Episcopal Church, according to the rites and ceremonies of the Church of England therein, to which the said lands are appurtenant,” which deed contained a proviso for conveyance by the trustees, upon the erection of a parsonage or rectory and presentation thereto, in the same terms as that contained in the patent of the 4th of September, 1820. The town of York was subsequently incorporated as the city of Toronto, and by letters patent, dated 16th January, 1836, a parsonage or rectory was erected and constituted in the said city of Toronto, designated as the first parsonage or rectory within the township of York, otherwise known as the parsonage or rectory of St. James, and 800 acres of land were set apart as a glebe or endowment, to be held appurtenant with the said parsonage or rectory, and the Hon. and Rev. J. S. was duly presented to be the incumbent of the said parsonage or rectory of St. James, and by deed poll, dated the 10th February, 1841, reciting the patent of the 4th September, 1820, the deed of the 4th July, 1825, and the presentation of the Hon. and Rev. J. S., the said J. B. R., W. A., and J. G. S., the then trustees, granted the said lands described in the said patent and deed to the said Hon. and Rev. J. S., rector of St. James, and his successors in the said rectory forever as a corporation sole, to and for the same uses and upon the same trusts as are mentioned and expressed in the said patent and deed. The Rev. H. J. G. succeeded the said Hon. and Rev. J. S. as incumbent on the 16th February, 1847, and was in possession of the said lands, and in receipt of the rents and profits thereof until the time of his death, which happened on the 20th March, 1882. In the year 1866 the statute 29 & 30 Vict. c. 16, entitled, “An Act to provide for the sale of rectory lands in this province,” was passed by the parliament of Canada, which gave the Incorporated Synod of any Diocese of the United Church of England and Ireland in Canada, or the Church Society, with the consent of the Synod where the Synod was not incorporated, “full power and authority to sell and absolutely dispose of any lands granted by the Crown in such Diocese, as a glebe of, or as appurtenant or belonging to, or appropriated for, any rectory of the said church in such Diocese, by whatever name the same may be called, or in whomsoever the title thereto may be vested.” In a suit brought by the incumbents of several rectories which were subsequently erected in the said city of Toronto, and the Synod of the Diocese of Toronto, to have the lands covered by the patent of 1820 and the deed of 1825 divided up under the provisions of that

Act, it was:—Held, (affirming the judgment of Ferguson, J., 7 O. R. 499) that the lands in question were covered by the terms of the Act: that prior to the year 1866 there were rectory lands derived directly from the clergy reserves, and lands specially granted to trustees, which were treated as endowments for rectories, and that the legislature intended to deal with both classes: that the delivery up and cancellation of the patent of 1817, being to correct an error, could not be held to be such a consideration as would make the patent of 1820 a grant for value; that Crown grants which were of a quasi public character were different from private gifts, and the Synod, in the case of the former, had petitioned for and obtained the power they desired: that 14 & 15 Viet. c. 175, s. 2, (C. S. C. c. 74.), afforded strong evidence that prior to the year 1866 there had been endowments for rectories out of the public domain, as well as out of the clergy reserves. *Langtry v. Denoulin*, 7 O. R. 644—Chy. D.

As to evidence to establish the status of certain rectors. See S. C., 7 O. R. 499.

Upon an application by the churchwardens of St. James's Church for leave to appeal from the judgment of the Chancery Division Court (7 O. R. 644) in their own names, or in the name of the rector, the defendant (who declined to carry the case further) as their trustee:—Held, that the rector was not a trustee for the applicants, but would himself, if the contention should prevail, be beneficially entitled to the fruits of the litigation; and that the applicants had not such an interest as entitled them to be made parties to the action, and the application was therefore refused. The event rendered it unnecessary to consider whether or not the application should have been made in this court or in the court below. S. C. 11 A. R. 544.

The sum received for commutation under the Clergy Reserve Act was paid to the church society of the Diocese of Huron, upon trust to pay to the commuting clergy their stipends for life, and when such payment should cease then "for the support and maintenance of the clergy of the Diocese of Huron in such manner as should from time to time be declared by any by-law or by-laws of the Synod to be from time to time passed for that purpose." In 1860 a by-law was passed providing that out of the surplus of the commutation fund, clergymen of eight years and upwards active service should receive each \$200, with a provision for increase in certain events. In 1873 the plaintiff became entitled under this by-law, and in 1876 the Synod (the successors of the church society) repealed all previous by-laws respecting the fund, and made a different appropriation of it:—Held, affirming the judgment of the court below, 9 A. R. 411, which reversed the decision of Proudfoot, J., 29 Chy. 348, Fournier and Henry, J.J. dissenting, that under the terms of the trust there was no contract between the plaintiff and defendants; the trustees had power, from time to time, to pass by-laws regulating the fund in question and making a different appropriation of it, for the support and maintenance of the clergy of the diocese, and the plaintiff must be assumed to have accepted his stipend with that knowledge and on that condition. *Wright v. Incorporated Synod of the Diocese of Huron*, 11 S. C. R. 95.

## II. TRUSTEES OF RELIGIOUS INSTITUTIONS.

In 1821 J. Bowerman and J. Bull joined in conveying certain lands to three persons, trustees of the West Lake meeting of friends, appointed by the monthly meeting to secure the titles of meeting house lots, and burying grounds, "to have and to hold said parcel of land hereby granted unto the aforesaid trustees of said monthly meeting for the time being, and for their successors in trust as said meeting shall from time to time see cause to appoint, for the only use and benefit of said meeting," and in 1835 Bowerman executed a further conveyance of a portion of those lands of which he had been the owner to two of the said trustees, "and to their successors, in trust for said meeting so long as the members constituting it shall remain and be from time to time continued in religious unity with the yearly meeting of friends (called Quakers) as now established in London, Old England, and no longer;" habendum "unto the aforesaid trustees of the said monthly meeting, and to their successors in trust for the time being as said meeting shall from time to time see cause to appoint, for the only use, behoof, and benefit of the said monthly meeting." The defendants contended that the identity of the existing monthly meeting with that described in these deeds had been lost by reason of departures from the principles which governed the society of friends at the time the trusts were created, as well in matters of discipline and practice as in points of faith and doctrine, and that the plaintiffs were consequently no longer entitled to the use and possession of the land:—Held, (reversing the judgment of Proudfoot, J., 7 O. R. 17,) that the criterion as to the monthly meeting was not the adherence to the doctrines and practices which prevailed at the time the trusts were created, but its continued existence as a monthly meeting of the organization of the society of friends to which it belonged at those times, and possibly to its members continuing in religious unity with the London yearly meeting: and that the defendants, never having been recognised by or in connection with the Canada yearly meeting, had no rights as an organization which a court of law could recognise or enforce. *Dorland v. Jones*, 12 A. R. 543. Affirmed in Supreme Court, not yet reported.

Semble, that R. S. O. c. 216, s. 10, as to the appointment of trustees of lands by religious bodies does not require the mode of appointment to be determined at one meeting and the appointment itself made at another. Both things may be done at the one meeting. S. C., 7 O. R. 17—Proudfoot.

### CLEARING LANDS.

See FIRE.

### CLOUD ON TITLE.

See SALE OF LAND.

## COLLATERAL SECURITY.

TO BANKS—See BANKS.

When certain collateral for the debt of \$1,000, which note given, such debt is discharged by the Statute of Collateral Security. *Wiley v. Ledgeway*, in Ordinary.

The plaintiff, as indorser in the note, pressed for payment, make, transfer, her limits, which to hold as security for the purpose of their debt. The Department, however, of any condition signment was in without adopting probable value of sale by public auction, plaintiff, when, made, they were ing made any further sale by plaintiff for \$6,000, ly sold by the plaintiff. Previous to the defendants had more than sufficient an action brought by defendants for selling Armour, J., gave plaintiff, with \$ appeal to this Court. Hagarty, C. J. that, under all the circumstances, be a new trial for forgery. Per Bur defendants sold authorisation, and have the limits defendants were and discretion, and be adopted by a plaintiff that could be obtained Bank, 13 A.

See Healey v. L.

## I. FOR SERVICE.

1. To Agents.
2. To Executors.
3. To Trustees.

## COMMISSIONS.

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O. R. 17

When certain securities had been assigned as collateral for the payment of a promissory note of \$1,000, which note was partly paid and a new note given, such securities may be held until the debt is discharged by payment. Though the remedy of a creditor to recover a debt be barred by the Statute of Limitations, he may hold the collateral securities for such debt until paid. *Wiley v. Ledyard*, 10 P. R. 182.—*Hodgins, Master in Ordinary*.

The plaintiff, being indebted to the defendants as indorser in the sum of about \$7,000, and being pressed for payment, which he was unable to make, transferred to the defendants certain timber limits, which he stated had cost him \$25,000, to hold as security for his indebtedness, and for the purpose of enabling them to sell it and realize their debt. The regulations of the Crown Lands Department, however, forbade the recognition of any conditional transfer, and therefore the assignment was in terms absolute. The defendants, without adopting any means of ascertaining the probable value of the limits, offered them for sale by public auction, with the assent of the plaintiff, when, no sufficient offer having been made, they were withdrawn, and, without having made any further inquiry as to value, they were sold by private sale, without consulting the plaintiff for \$6,000. The limits were subsequently sold by the purchaser for a very large sum. Previous to the attempted sale by auction the defendants had received several offers of sums more than sufficient to pay off their claim. In an action brought by the plaintiff against the defendants for selling at a grossly inadequate price, *Armour, J.*, gave judgment in favour of the plaintiff, with \$19,654.38 damages, which, on appeal to this Court, was affirmed with costs, *Hagarty, C. J. O.*, dissenting, on the ground that, under all the circumstances, there should be a new trial for the purpose of further investigation. Per *Burton and Patterson, JJ. A.* The defendants sold by private contract, without authorisation, and did not take proper steps to have the limits valued. Per *Osler, J. A.* The defendants were bound to exercise proper care and discretion, and to adopt such means as would be adopted by a prudent man to get the best price that could be obtained. *Prentice v. The Consolidated Bank*, 13 A. R. 69.

See *Healey v. Dolson et al.*, S.O. R. 691, p. 51.

### COMMISSION.

#### I. FOR SERVICES RENDERED.

1. To Agents—See PRINCIPAL AND AGENT.
2. To Executors and Administrators—See EXECUTORS AND ADMINISTRATORS.
3. To Trustees—See TRUSTS AND TRUSTEES.

### COMMISSION TO EXAMINE WITNESS.

See EVIDENCE.

### COMMISSIONERS OF POLICE.

See POLICE.

### COMMITMENT.

#### I. ARREST—See ARREST.

#### II. ATTACHMENT—See ATTACHMENT OF THE PERSON.

A warrant of commitment need not be dated if not issued too soon. *Regina v. Sanderson*, 12 O. R. 178.—*Osler*.

### COMMON CARRIERS.

See CARRIERS.

### COMPANY.

See CORPORATIONS.

### COMPENSATION.

#### I. FOR TAKING OR INJURING LANDS.

1. By Municipalities—See MUNICIPAL CORPORATIONS.
2. By Railway—See RAILWAYS AND RAILWAY COMPANIES.

#### II. FOR IMPROVEMENTS—See IMPROVEMENTS ON LAND.

#### III. ON SALES OF LAND—See SALE OF LAND.

#### IV. FOR USE OF WORKS AND IMPROVEMENTS IN STREAMS—See WATER AND WATER COURSES.

#### V. TO AGENTS—See PRINCIPAL AND AGENT.

#### VI. TO EXECUTORS—See EXECUTORS AND ADMINISTRATORS.

#### VII. TO TRUSTEES—See TRUSTS AND TRUSTEES.

### COMPROMISE.

OF ACTIONS—See ACTION.

Note given to compromise criminal charge. See *Bell v. Riddell*, 10 A. R. 544, p. 50.

Reference of indictment and all matters in difference to arbitration. See *Corporation of the Township of Hungerford v. Lattimer*, 13 A. R. 315.

### COMPUTATION OF AMOUNT DUE.

See INTEREST ON MONEY.—JUDGMENT.

### COMPUTATION OF TIME.

See TIME.

## CONDITIONAL CONTRACT.

SALE OF LAND—See SPECIFIC PERFORMANCE.

## CONDITIONS.

I. IN DEEDS—See DEED.

II. IN POLICIES—See INSURANCE.

III. OF SALE—See SALE OF LAND BY ORDER OF THE COURT.

IV. IN WILLS—See WILL.

## CONFLICT OF CASES.

See COURTS.

## CONSIDERATION.

I. IN BILLS AND NOTES—See BILLS OF EXCHANGE AND PROMISSORY NOTES.

II. IN BILLS OF SALE AND CHATTEL MORTGAGES—See BILLS OF SALE AND CHATTEL MORTGAGES.

III. IN CONTRACTS—See CONTRACTS.

IV. INADEQUACY OF—See FRAUD AND MISREPRESENTATION.

## CONSOLIDATING ACTIONS.

See PRACTICE.

## CONSPIRACY.

See CRIMINAL LAW.

By deputy returning officer and agent of candidate to interfere with the franchise of voters. See *Soulanges Election—Cholette v. Bain*, 10 S. C. R. 652.

## CONSTABLE.

In an action for malicious arrest the jury found a general verdict for the plaintiff, with \$200 damages. They also specially found, in answer to a question put to them, "that the defendant honestly believed that his duty as constable called upon him to make the arrest." The learned judge thereupon entered a nonsuit, holding that the defendant should have received notice of action. The general issue by statute R. S. O. c. 73, was not pleaded, and the statement of defence was not framed so as to enable the defendant to avail himself of it; and the court were of opinion under the facts, set out in the case, that there was no evidence on which the special finding of the jury could be supported:—Held, that the nonsuit must be set aside, and judgment entered for the plaintiff, with \$200 damages as assessed. If the statute has not been pleaded honest belief is no defence, if there existed no

reasonable ground for such belief. *McKay v. Cummings*, 6 O. R. 400—C. P. D.

Liability in replevin for improperly impounding sheep. Notice of action. See *Ibbotson v. Henry*, 8 O. R. 625.

Agreement to account for fees received in county constable by chief of police of a town. See *The Corporation of the Town of Stratford v. Wilson*, 8 O. R. 104.

## CONSTITUTIONAL LAW.

I. GENERALLY, 84.

II. CONSTITUTIONALITY OF STATUTES.

1. Under British North America Act, 1867, 84.

2. Other Statutes, 87.

I. GENERALLY.

The legislative assembly of Ontario has no criminal jurisdiction, and therefore has no jurisdiction in case of a conspiracy to bribe members to vote against the government considered as criminal offence. *Regina v. Bunting et al.*, 7 O. R. 524—Q. B. D.

The legislative enactments of a country have no binding force *proprio vigore* in another country, and a legislature cannot authorize corporations created by it to carry on business in a foreign country. Where, however, a legislature assumes to do, such authority is only a legislative sanction to the agreement of the corporators to transact their business abroad as well as at home. *Clarke v. Union Fire Ins. Co.*, 10 P. R. 313. *Hodgins, Master in Ordinary*.

II. CONSTITUTIONALITY OF STATUTES.

1. Under British North America Act, 1867.

Held, that the constitution of a court or judicial tribunal for the determination of disputes under the Patent Act 1872, s. 28, was not ultra vires the Dominion Parliament. *In re the Telephone Company and the Telephone Manufacturing Company and the Minister of Agriculture*, 7 O. R. 605.—Osler.

As to the power of the Provincial Government to appoint police magistrates. See *Regina v. Richardson*, 8 O. R. 651.

Per Patterson, J.A., the legislation of the Dominion Parliament forbidding the defendant contracting against liability for their own negligence is not ultra vires. *Vogel v. The Great Railway Company—Morton v. The Same Company*, 10 A. R. 162.

The jurisdiction of the Provincial Legislature over "property and civil rights" does not preclude the Parliament of Canada from giving an informer the right to recover, by a civil action a penalty imposed as a punishment for bribery at an election. The Dominion Elections Act, 1874, by sec. 50, provides that all penalties and forfeitures other than fines in cases of misdemeanor imposed by the Act shall be recoverable with full costs of suit, by any person who

for the same, in any of the provinces in which the enactment was made.

The term "property" refers to local distinctions in all provinces in which the enactment was made. *Clarke v. Hodgins*, 10 P. R. 313.

The defendant, incorporated in Ontario, 41 Vic. is provided that the constitution contains many false statements of the concealment of insured property, or of any change in insured property, a part of the company policy void:—"Held, as provided for by matters of the Ontario, over which jurisdiction, a paper subjects of have no force or vitality per se, but only modified by said insurer provided for therein contained. The Queen Ins. Co. commented upon *Actual Fire Ins. Co.*

The Acts 31 Vict. 9, (Dom.) relating ultra vires the *Medical and Allied* (2) 12 O. R.

As to sec. 136 of the *Attorney-General v. Peak*, 8 S. C. R. 512. Per Fournier, H. C. 46, 47 and 48 (Banking Act 1871) and *The Minister of Agriculture*, 8 S. C. R. 512.

Held, that Quebec which imposed a duty on *Attorney-General*, 141.

certain ordinance law, in 1858, patented of T., with the following always, and will be dedicated by them maintained for the use, benefit of the said inhabitants of the said *The Ontario* from the Ontario, "to" the said land



McKay v. The Corporation of the City of Montreal, 11 A. R. 226. The term "provincial objects" in the B. N. A. Act refers to local objects within a province, in contradistinction to objects which are common to all provinces in their collective or Dominion capacity. *Clarke v. Union Fire Ins. Co.*, 10 P. R. 313. —Hodgins, *Master-in-Ordinary*.

The defendant, a mutual insurance company, was incorporated by an Act of the Dominion Parliament, 41 Vict. c. 40, by sec. 28 of which it was provided that "any fraudulent misrepresentation contained in the application therefor, or any false statement respecting the title or the ownership of the applicant or his circumstances, or the concealment of any incumbrance on the insured property, or the failure to notify the company of any change in the title or ownership of the insured property, and to obtain the written consent of the company thereto shall render the policy void."—Held on demurrer, that the matters provided for by the above section were subject-matters of the "Fire Insurance Policy Act" of Ontario, over which the province has exclusive jurisdiction; and although they might be proper subjects of legal contract, they would have no force or vitality through the Dominion Act per se, but only by being used as required and modified by said Ontario Act, namely in the manner provided for variations to the conditions therein contained. *Citizens Ins. Co. v. Parsons* (The Queen Ins. Co. v. Parsons, 7 App. Cas. 189) commented upon. *Goring v. The London Mutual Fire Ins. Co.*, 11 O. R. 82.—O'Connor,

The Acts 31 Vict. c. 48, (Dom.) and 34 Vict. c. 9, (Dom.), relating to insurance companies are ultra vires the Dominion Parliament. *Re Ontario Medical and General Life Association (Limited)* (2) 12 O. R. 441.

As to sec. 136 of the Insolvent Act 1875 being ultra vires the Dominion Parliament. See *Held v. Peak*, 8 S. C. R. 579.

Per Fournier, Henry, and Taschereau, J.J., in sections 46, 47 and 48 of 34 Vict. c. 5 (Dom.) (the Banking Act 1871) are intra vires the Dominion Parliament. *The Merchants Bank of Canada v. The Bank of Montreal*, 11 S. C. R. 512.

Held, that Quebec Act, 43 & 44 Vict. c. 9, which imposed a duty of ten cents upon every writ filed in court in any action depending therein is ultra vires the Provincial Legislature. *Attorney-General for Quebec v. Reed*, 10 App. Cas. 141.

Certain ordinance land vested in the Crown in 1858, patented to the corporation of the City of T., with the following clause in the patent: "Provided always, and this grant is subject to the following condition, viz., that (the land) \* \* \* shall be dedicated by the said corporation, and then maintained for the purpose of a public park for the use, benefit, and recreation of the inhabitants of the said city of T., for all time to come." The corporation of T., in 1876, obtained from the Ontario Legislature an Act empowering them "to lease, sell, or otherwise dispose of" the said land, and one of their com-

mittees transferred it to another to use as a cattle market, receiving a yearly rent therefor which they applied to a park fund as provided by the Act giving the power to sell, &c. In an action by a ratepayer to prevent the land being used as a cattle market, and more money being spent on it for that purpose, in which it was contended that the land was granted upon a condition under which the Crown might retake it, and that the Act of the Provincial Legislature was ultra vires in dealing with it. It was:—Held, on demurrer, that the words in the patent "Provided always and this grant is subject to the following conditions," did not create a condition annexed to the estate granted, but a trust was created the same as if the words used had been "upon the following trusts," and that by the grant the grantors parted with all their estate and interest; that the matter came within sub-s. 13 of s. 92 B. N. A. Act, "Property and Civil rights in the Province," and the Provincial Legislature was the proper one to legislate on the subject, and the subject, and the Act was not ultra vires. *Kennedy et al. v. The Corporation of the City of Toronto et al.*, 12 O. R. 211.—Ferguson.

Professing to act under the powers contained in their Act of incorporation, 45 Vict. c. 100 N. B., the Q. R. B. Co. erected booms and piers in the Quddy river which impeded navigation—the locus being in that part of the river which is tidal and navigable:—Held, that the Provincial Legislature might incorporate a boom company, but could not give it power to obstruct a tidal navigable river, and therefore the Act 45 Vict. c. 100 N. B., so far as it authorizes the acts done by the company in erecting booms and other works in the Quddy river obstructing its navigation, was ultra vires the New Brunswick Legislature. *Quddy River Driving Boom Co. v. Davidson*, 10 S. C. R. 222.

Held, per Ritchie, C.J. and Strong and Fournier, J.J., that the provisions of the provincial statute, 42 & 43 Vict. c. 4, (Que.) ordering houses in which spirituous liquors, &c., are sold to be closed on Sundays and every day between eleven o'clock of the night and until five o'clock in the morning, are police regulations within the power of the Legislature of Quebec. *Poulin v. The Corporation of Quebec*, 9 S. C. R. 185.

The Quebec License Act, 41 Vict. c. 3, is intra vires of the legislature of the Province of Quebec. *Hodge v. The Queen*, 9 App. Cas. 117, followed. *Sulte v. The Corporation of the City of Three Rivers*, 11 S. C. R. 25.

Right of Province of Ontario to Indian lands. See *Regina v. The St. Catharines Milling and Lumber Company*, 13 A. R. 148.

The questions arising in this case as to the conditions of a mutual fire insurance policy were: Held not to be of such a constitutional character as to require notice to the attorney-general of the province, or the minister of justice of the Dominion. See *Goring v. The London Mutual Fire Ins. Co.*, 11 O. R. 82.

See also *The Thames Navigation Company (Limited) v. Reed et al.*, 9 O. R. 754; *Re Simmons and Dalton*, 12 O. R. 505; *The Merchants Bank of Halifax v. Gillespie, Moffatt & Co.*, 10 S. C. R. 312.



3. *Corporations*—See CORPORATIONS.—MUNICIPAL CORPORATIONS.

4. *Married Women*—See HUSBAND AND WIFE.

5. *Partners*—See PARTNERSHIP.

# XI. PARTICULAR CONTRACTS.

1. *Building Contract*—See WORK AND LABOUR.

2. *For Carriage*—See CARRIERS—RAILWAYS AND RAILWAY COMPANIES—SHIP.

3. *Covenants*—See COVENANT.

4. *Guarantee*—See GUARANTEE AND INDEMNITY.

5. *Contracts of Marriage*—See HUSBAND AND WIFE.

6. *Of Hiring*—See MASTER AND SERVANT.

7. *Of Insurance*—See INSURANCE.

8. *Of Tenancy*—See LANDLORD AND TENANT.

9. *Of Partnership*—See PARTNERSHIP.

10. *Of Suretyship*—See PRINCIPAL AND SURETY.

11. *Sale of Goods*—See SALE OF GOODS.

12. *Sale of Land*—See SALE OF LANDS.

13. *Sale of Timber*—See TIMBER.

14. *Warranty*—See WARRANTY.

15. *Work and Labour*—See WORK AND LABOUR.

## I. FORMATION OF THE CONTRACT.

### 1. By Letters or Telegrams.

M. offered to give J. \$1,500 for a certain lot of land containing a 50 feet frontage. J. replied that he would take \$1,750 for the 50 feet, or \$1,500 for 35 feet of the 50 feet. Before receiving any answer, S. telegraphed to M.: "Coming Monday to accept \$1,500. Waiting immediate reply." M. telegraphed back: "Come at once." M. now alleged that these telegrams constituted a contract for the sale of the 50 feet to him for \$1,500, and claimed specific performance:—Held, that the telegrams did not constitute any such contract, for it was ambiguous to which proposal of \$1,500 J.'s telegram referred, and moreover the words "coming to accept" did not shew an actual acceptance, but were merely an expression of intention to do something in the future. *McFarren v. Johnson*, 6 O. R. 161.—Proudfoot.

In order to convert a proposal into a promise, the acceptance must be absolute and unqualified, and should be prompt and immediately given. *Fulton Bros v. Upper Canada Furniture Company*, 9 A. R. 211.

The plaintiffs having agreed to supply the defendants with 100,000 feet of lumber subject to inspection, the defendants in a subsequent letter assumed that this was to be "American inspection," and the plaintiffs answered "we do not know anything about American inspection, but will submit to any reasonable inspection." No formal waiver of the inspection claimed by the defendants was made by them, neither was there any agreement by the plaintiffs to submit to such inspection:—Held (reversing the judgment of

the court below, 32 C. P. 422), that there had not been shown "a clear accession on both sides to one and the same set of terms," and that a concluded agreement had not been made out between the parties. *Id.*

R. wrote to O. "I have considered the matter of our conversation, and offer you \$800 for the property." O. replied: "I have your favour offering \$800 for the property (describing it). I have concluded to accept your offer." The evidence showed that at the prior conversation referred to in R.'s letter, R. was seeking to buy the property in question on terms of five or seven years' credit:—Held, that as the acceptance by O. was as of a cash offer, while R. did not intend to make any such offer, the contract could not be specifically enforced, the parties differing in their understanding of it. *Omnium Securities Company v. Richardson*, 7 O. R. 182.—Boyd affirmed on appeal. *Id.*, 185.

A letter containing an offer written "without prejudice" means "I make you an offer; if you do not accept it this letter is not to be used against me," but when the offer is accepted the privilege is removed. *S. C.*, 7 O. R. 182.—Boyd.

Per Burton, J. A., when a proposal is made in writing by one party and accepted ad idem by the other, either verbally or by acting upon it, the contract is a written one. *Ellis v. Abell*, 10 A. R. 226.

On the 26th January, 1882, McI. wrote to H. as follows: "A. McI. agrees to take \$35,000 for property known as McM. block. Terms—one-third cash, balance in one year at eight per cent. per annum. Open until Saturday 28th, noon." On the same day H. accepted this offer in the following terms: "I beg to accept your offer made this morning. I will accept the property known as McM. block, being the property on M. street, for \$35,000, payable one-third cash on completion of title, and balance in one year at eight per cent. You will please have papers and abstract submitted by your solicitor to N. F. H., Esq., 22, D. block, as soon as possible, that I may get conveyance and give mortgage." On a bill for specific performance, the Court of Queen's Bench (Man.) decreed that H. was entitled to have the agreement specifically performed:—Held, (Ritchie, C. J., and Fournier, J. dissenting) that there was no binding, unconditional acceptance of the offer of sale, and therefore no completed contract of sale between the parties. *McIntyre v. Hood*, 9 S. C. R. 556.

Where property was sold by auction, the particulars and conditions of sale not disclosing the vendor's name, and the contract was duly signed by the purchaser, but was not by the vendor or the auctioneer acting in the matter of sale, and subsequently, in consequence of delays on the part of the purchaser, the attorneys for the vendor (one of whom was the vendor himself) wrote in the course of a correspondence which ensued: "Re S.'s purchase, we would like to close this." And referring to certain representations made in the advertisements of the sale: "They were not made part of the contract of sale." Have the goodness to let us know whether the vendee will pay cash or give mortgage. If the latter we will prepare it at once and send you draft for approval;" and on a subsequent occasion: "Re S.'s purchase. Herewith please re-

ceive deed for approval," and on another occasion the vendor himself wrote "I shall take immediate steps to enforce the contract."—Held, affirming the judgment of the court below, (8 A. R. 161), that the conditions of sale together with the correspondence were sufficient to constitute a complete and perfect contract between the vendor and purchaser within the statute of frauds. *O'Donohue v. Stammers*, 11 S. C. R. 358.

See also *Ryan v. Sing*, 7 O. R. 266; *Christie v. Burnett*, 10 O. R. 609.

### II. CONSIDERATION.

On May 27th, 1885, certain individuals forming a cigar manufacturers association, amongst whom was the defendant, considering themselves aggrieved by the members of the cigar makers union, who refused to lower the price of making a particular kind of cigar, entered into an agreement in writing between themselves of the first part and S. of the second part, as follows: "Whereas, for the mutual advantage and protection of the parties hereto \* \* \* it has been agreed that the parties of the first part shall become severally bound to S. in the sum of \$500, liquidated damages in case any of them shall at any time during the continuance of this agreement, either directly or indirectly, buy or sell any cigars marked \* \* \* with the labels of the cigar makers union, or shall use \* \* \* in connection with the manufacture of cigars by him any cigar makers union label, \* \* \* or shall permit \* \* \* any cigar makers union, or any union or set of men to compel him to hire or employ union men only, or to dismiss any employee. Now, therefore, \* \* \* the parties hereto of the first part severally covenant with S. each for himself that he will, in case he shall at any time hereafter violate any of the foregoing stipulations (setting them out) immediately pay to S. the sum of \$500: the intention being that in case of a violation of all or any of the stipulations \* \* \* aforesaid by any of the parties hereto of the first part, he, the said party so offending, shall immediately forfeit and pay to S. the full sum of \$500, \* \* \* because of his so offending, as liquidated and ascertained damages (and not as a penalty), to be by S. applied, &c. \* \* \* The intention, also, being that the entire sum of \$500 shall be the amount of the ascertained and liquidated damages of any violation or breach whatever, of any of the stipulations \* \* \* aforesaid on the part of any one of the parties of the first part." The defendant having broken the above agreement in all respects, S. brought this action against him to recover \$500 as liquidated damages:—Held, that the mutual obligations imposed by the contract constituted a sufficient consideration for it:—Held, also, that the agreement was not invalid, on grounds of public policy, and as in undue restraint of trade. *Collins v. Locke*, 6 App. Cas. 674; and *Hornby v. Close*, L. R. 2 Q. B. 153, distinguished. *Schrader v. Lillis*, 10 O. R. 358.—Proudfoot.

The defendant, having delivered ties to a railway company in excess of his contract, as he alleged, arranged that such ties should be returned as received by the company on a contract with the plaintiff. In anticipation of such returns, and of payment therefor, the plaintiff paid

the defendant \$1,000, and brought this action to recover the same, alleging that he never was able to procure returns or payment from the railway company, and that the consideration for the \$1,000 had therefore failed. It was shewn in evidence that the plaintiff had, in a claim against the railway company for 19,883 ties, including 3,260 delivered by the defendant, and that the railway company disputing such claim, a settlement had been effected, the plaintiff accepting \$1,000 in full of his claim, and giving the company a formal release of all demands:—Held, that, to the extent to which the ties were delivered by the defendant on plaintiff's account the latter could not, in view of the circumstances, allege failure of consideration; but that he was not bound by the settlement to pay for ties that were not delivered, and therefore that the determination of the action depended upon the result of the inquiry directed as to the number of ties delivered by defendant; and an appeal from the judgment directing such inquiry was accordingly dismissed. The objection, that the judge at trial should have himself decided the issue as to failure of consideration, instead of directing an inquiry before the master, is not one that the court will entertain. *Featherstone v. VanAlb*, 12 A. R. 133.

See *Wicher v. Darling*, 9 O. R. 311, p. 93.

### III. OPERATION OF THE STATUTE OF FRAUDS.

#### 1. Agreements not to be Performed within a Year.

See *Brown v. Nelson*, 7 O. R. 90, p. 97.

#### 2. Agreements Necessary to be in Writing.

The plaintiff, who was mortgagee of certain lands, alleged that L., the present holder of the mortgage, purchased it from C. with knowledge of the fact that C. had purchased it from the original mortgagee as trustee for the plaintiff who was to be allowed to redeem on paying whatever C. should pay for the mortgage, and a certain additional sum for C.'s services; and sought to redeem on payment of what was due under the said agreement with C.:—Held, that the above agreement fell within the statute of frauds, and should be evidenced in writing:—Held, also, that even if this were not so, L. could not be affected by such agreement, having purchased without notice of it. *Wright v. Leys et al.*, 8 O. R. 38—Chy. D.

### IV. VALIDITY AS REGARDS PUBLIC POLICY.

#### 1. Restraint of Trade.

D. on entering the employment of W. as agent in the vending of teas and coffees, covenanted with W. not to engage in the sale or delivery of teas or coffees in the city of Toronto, either for himself or as agent for any other person for at least two years after leaving W.'s employ. W. now moved for an injunction to restrain D., who had left her employment, from violating the above covenant:—Held, that the covenant was binding, upon D., notwithstanding that the consideration for it might have been inadequate:—Held also that the above covenant was not invalid on grounds of public policy. A covenant in restraint

of trade is not in itself illegal, and wider than the rule can possibly be. *10 O. R. 311.*—Rd.

See *Schrader v. Lillis*.

### VI. EFFECT.

S. & Co., contracting for the response, brought an action against the defendant for breach of contract. The decision on counts, partly formed. By the finding, when erected, the provisions of the contract were under authority of the New Brunswick Statute, the contract was void. The plaintiff's action to the Supreme Court to set such non-suit was dismissed. *Henry, J.*, dissented. The city of St. J. legal, and, therefore, over. Walker followed. Per He the building would be a violation, the non-suit trial ordered. *Spr*

### VII. CONSTRUCTION.

The rule now is, that a contract in question which is illegal, whether the illegality is in law or in fact, is void. *Kitchin v. Chy. D.*

S. and H., trading as E. under the name of S. & H. E., under a penalty of \$500, for doing business in the city of five years." V. commenced a hardware business with M. amount to a breach, though the matter was not decided. *Elliot v. Stanley et al.*

Defendant agreed to pay money to construct a drain, known as the "Dunwich drain," to be furnished "at any time," and often and in such a manner as the plaintiff to give the sum required, and at 12 per cent. per annum. Plaintiff alleged that in breach of the agreement he constructed the drain from time to time, and paid \$1,500, but no drain, and defendant. The plaintiff bore

trade is not invalid unless the restraint is larger and wider than the protection of the covenantee can possibly require. *Wheeler v. Darling*, 10 O. R. 311.—Rose.

See *Schraeter v. Lillis*, 10 O. R. 358, p. 91.

# VI. EFFECT OF MUNICIPAL BY-LAWS.

S. & Co., contractors for the erection of a building for the respondent in the city of St. John N. B., brought an action claiming to have been prevented by respondent from carrying out their contract. The declaration also contained the common counts, part of the work having been performed. By the terms of the contract the building, when erected, would not have conformed to the provisions of a by-law of the city passed under authority of an Act of the general assembly of New Brunswick, 41 Vict. c. 7) two days after the contract was signed. On the trial of the action the plaintiffs were nonsuited, and an application to the Supreme Court of New Brunswick to set such nonsuit aside was refused:—Held, (Henry, J., dissenting) that the by-law of the said city of St. John made the said contract illegal, and, therefore, the plaintiffs could not recover. *Walker v. McMillen*, 6 S. C. R. 241, followed. Per Henry, J.—That the erection of the building would not, so far as the evidence showed, be a violation of the by-law, and therefore, the non-suit should be set aside and a new trial ordered. *Sparks v. Walker*, 11 S. C. R. 113.

# VII. CONSTRUCTION OF CONTRACTS.

## 1. Generally.

The rule now is, that if the legal part of the contract in question can be severed from that which is illegal, the former shall stand good whether the illegality exist by statute or common law. *Kitching v. Hicks et al.*, 6 O. R. 739.—Chy. D.

S. and H., trading partners sold out their business to E. under a written agreement, as follows:—"S. & H. do hereby bind themselves to E. under a penalty of \$2,000, that they will not do business in Chesley in hardware for the term of five years." Within the five years S. commenced a hardware business in Chesley, in connection with M.:—Held, that this did not amount to a breach of the above agreement, though the matter was not free from doubt. *Elliott v. Stanley et al.*, 7 O. R. 350.—Boyd.

Defendant agreed to furnish plaintiff with money to construct a drain in the township of Dunwich, known as the Mennie drain the amount to be furnished "not to exceed the sum of \$1,500 at any time," and to pay the same to plaintiff as often and in such sums as might be required, the plaintiff to give the defendant his note for each sum required, and to pay defendant interest at 12 per cent. per annum for the use of said moneys. Plaintiff alleged that upon the strength of this agreement he contracted with the township to construct the drain. Defendant furnished moneys from time to time to the plaintiff, exceeding in all \$1,500, but not sufficient to complete the drain, and defendant refused to furnish more. The plaintiff borrowed moneys from others at

less than 12 per cent. interest, but claimed damages for alleged breach of his agreement, contending that he was thereby delayed in completing the drain, and that owing to such delay and to the winter setting in he lost largely, instead of making a profit, which he would otherwise have made:—Held, that whether the agreement was to furnish money to the extent of \$1,500 only, or to such extent as might be necessary for the construction of the drain, not exceeding \$1,500 at any one time, the only damages for which defendant was liable would be the difference between the rate of interest payable to defendant under the agreement and the market rate of interest at the time of the breach. Per Armour, J., under the true construction of the agreement the defendant was bound to supply \$1,500 only. *Mennie v. Leitch*, 8 O. R. 397.—Q. B. D.

The plaintiff, suing as assignee of an appeal bond given by the defendants to G. & M. on an appeal, which was dismissed, by S. and the N. R. H. company from a judgment recovered by G. & M., claimed the amount of the judgment with costs and interest, less a sum realised by the sheriff on G. & M.'s *fi. fa.* goods by the sale to the plaintiff of a mill and fixtures erected by the N. R. H. Co., on Crown lands which the company occupied under a letter of license from the commissioner of Crown lands. The defendants were shareholders in the company, and after the sheriff's sale they and the plaintiff agreed to take steps to reorganise the company, the plaintiff to accept shares in satisfaction of his claim. This agreement, which the plaintiff had refused to carry out, was relied on as a defence to this action. At the trial the learned judge held that the agreement was too vague for specific performance, and was therefore no defence; and being of opinion that nothing passed by the sheriff's sale to the plaintiff, he gave judgment for the whole amount of the original judgment of G. & M. with costs and interest, against the wish of the plaintiff, who claimed only the reduced amount. The defendants moved against the judgment respecting the agreement, and a Divisional Court of two judges, while agreeing that it was too vague for specific performance, differed as to its affording a defence to the action. The plaintiff also moved to reduce his judgment by deducting the amount of his bid at the sheriff's sale; but that order, by reason of the judges disagreeing, was not granted. On appeal by the defendants it was:—Held, that the agreement was only to accept shares in case the company was reorganised, and such agreement afforded no defence to this action; and that the judgment could properly be varied by entering it for the reduced amount. The appeal was therefore dismissed, with costs. *Brundage v. Howard et al.*, 13 A. R. 337.

The plaintiffs under a by-law granted the defendant a bonus of \$20,000 to aid him in the manufacture of steam fire engines and agricultural implements, subject to a condition in the by-law that he should give a mortgage on the factory premises for \$10,000, and a bond for \$10,000, to be conditioned: (1) for the carrying on of such manufactures for 20 years; (2) during that period to keep \$30,000 invested in the factory; and (3) to insure the building and plant in plaintiffs' favour for \$10,000. The defendant gave the bond and mortgage, the latter containing a covenant for insurance, and he invested the

\$30,000, as stipulated for. He also made a further mortgage on the premises to the plaintiffs for \$3,000, not mentioned in the by-law. The factory was one in which 18 to 25 men might have been employed, and which could have turned out 100 mowers in a year. In the course of two years only 20 mowers were constructed, and the number of persons employed dwindled down from 18 or 20 to two or three:—Held, that the performance contemplated by the parties of the contract to carry on manufactures was one reasonably commensurate with the capabilities of the factory; and that, upon the evidence, the defendant had failed in the performance:—Held, also, that the \$10,000 mortgage was given as a security for any damages the plaintiffs might sustain by the defendant's default, to an extent not greater than \$10,000, and not as a charge for that specific sum:—Held, also, that, as the \$3,000 mortgage was not authorized by the by-law, as to it the plaintiffs were not entitled to any relief. Remarks upon elements to be considered by the master in assessing the damages. *Corporation of the Village of Brussels v. Ronald*, 11 A. R. 605.

The defendant company, who were empowered by statute to run a traction engine over certain highways in the county of York, and who by their charter were allowed to construct a tramway in the county to be worked by horse or steam power, upon such terms as might be agreed on with the municipalities through which the road might pass, entered into an agreement with the county, whereby it was agreed that the company should be at liberty to lay down a tramway along a certain road; that the tolls to be collected should not exceed certain specified rates on one and two horse vehicles; that the company, if required, should run two passenger cars daily each way, or in lieu thereof an omnibus or sleigh; that in case horses, carriages, teams, or other vehicles or animals met the horses, waggons, carriages, or other vehicles of the company, the latter should have the right of way, and that "so soon as this agreement shall have been ratified by the said corporation, the said company shall forthwith withdraw their said traction engine from the public highways of the said county, and shall discontinue the use of the said traction engine, and of any other traction engine, upon or along such public highways." The company insisted that they were at liberty, under the agreement, to run a steam motor upon the said tramway. Thereupon an action was instituted by the corporation to restrain the use of steam power on the tramway, which relief the court below (Proudfoot, J.), on the hearing of the cause, granted. Upon appeal, this court being equally divided, the appeal was dismissed, with costs. Per Hagarty, C. J. and Patterson, J. A. (agreeing with Proudfoot, J.), on the true construction of the agreement there was, if not an express, at least an implied qualification excluding the use of steam as a motive power. Per Burton, J. A. and Rose, J., what the company had agreed to abandon was only the right therefore exercised by them,—under the general law, 31 Vict. c. 34 (R. S. O. c. 186)—of using traction engines on the public highway, and that they were not restricted by the agreement from using steam motors on the tramway. *The Corporation of the County of York v. The Toronto Gravel Road and Concrete Co.*, 11 A. R. 765. Affirmed by the Supreme Court.

Under 32 & 33 Vict. c. 7, which provides that the printing, binding, and other like work required for the several departments of the government shall be done and furnished under contracts to be entered into under authority of the governor in council after advertisement for tenders, the under secretary of state advertised for tenders for the printing "required by the several departments of the government." The suppliers tendered for such printing, the specifications annexed to the tender, which were supplied by the government, containing various provisions as to the manner of performing the work and giving of security. The tenders were accepted by the governor in council, and an indenture was executed between the suppliers and Her Majesty, by which the suppliers agreed to perform and execute, &c., "all jobs or lots of printing for the several departments of the Government of Canada, of reports, &c., of every description and kind soever coming within the denomination of departmental printing, and all the work and services connected therewith and appertaining thereto, as set forth in the said specification hereto annexed, in such numbers and quantities as may be specified in the several requisitions which may be made upon them for that purpose from time to time by and on behalf of said several respective departments." Part of the departmental printing having been given to others, the suppliers, by their petition, claimed compensation by way of damages, contending that they were entitled to the whole of said printing:—Held (affirming the judgment of Henry, J., in the Exchequer Court), that having regard to the whole scope and nature of the transaction, the statute, the advertisement, the tender, the acceptance, and the contract, there was a clear intention shewn that the contractors should have all the printing that should be required by the several departments of the government, and that the contract was not an unilateral contract, but a binding mutual agreement. (*Taschereau and Gwynne, JJs., dissenting.*) *Regina v. MacLean*, 8 S. C. R. 210.

G. M., a man of education, well acquainted with commercial business, executed a bond to pay certain sums of money, in certain events to the Merchants Bank of Canada. By an agreement, bearing even date with the bond, it was recited inter alia that in consideration of a mortgage granted to the bank by M. Bros. & Co., the bank had agreed to make further advances to M. Bros. & Co., joint obligors with G. M., and parties to the agreement, and that the agreement was executed to secure the bank in case there should be any deficiency in the assets of the firm, or in the value of the property comprised in said mortgage, and to secure the bank from ultimate loss. The agreement contained also a proviso that if the firm should well and truly pay their indebtedness, then the bond and agreement should become wholly void. In a suit brought upon the said agreement against G. M., alleging a deficiency in the assets of the firm and indebtedness to the bank, G. M. pleaded that the agreement had been executed by him on representation made to him by one of his co-obligors that it was to secure the bank against any loss which might arise by reason of the refraining from the registration of the mortgage, or by reason of any over valuation of the property embraced in the mortgage, and not otherwise. The

bank, the plaintiff, whatever to the judgment of Gwynne, J., dissenting, the execution of upon them according to *Moffatt v. Mer*, R. 46.

See *Omnium*, 7 O. R. 182, 183; R. 90, *infra*, 8 206; *Hughes v.*

VI  
The plaintiff defendant 76 share Company, and payable in two years which were transferred to the plaintiff's request, and, as the jury found, other shares of which discounted. The jury also found that the plaintiff had purchased the interest in the Company, and that the plaintiff in the managing director, a fixed salary, of the note retired himself of the 12th of the month of June, 1890, and afterwards, managing director, the turn of the 44th of the month of June, for which the raising of money by George Brown's for a return of the purchase of the condition of the retained in office, been broken by dismissal:—Held, that the plaintiff's performance by retaining the within which the paid for, there of whole contract; ing of the jury been moved again these shares, and the price of the plaintiff's remedy, if by an independent defendant having agreement, the agreements not was not applicable, the plaintiff in of 90—C. P. D.

In order to reformance of a contract must shew a will to perform, and of and unequivocal refusal was treated as a tort; for, if after demand compliance be deemed as compliance. *McClellan v. Wins*



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bank, the plaintiffs, made no representations whatever to the defendants:—Held, affirming the judgment of the court below, 5 O. R. 122. Gwynne, J. dissenting, that G. M. was bound by the execution of the documents, and was liable upon them according to their tenor and effect. *Maffitt v. Merchants Bank of Canada*, 11 S. C. R. 46.

See *Omnium Securities Company v. Richardson*, 7 O. R. 182, 185, p. 90; *Brown v. Nelson*, 7 O. R. 90, *infra*. See also *Ryan v. Sing*, 7 O. R. 266; *Hughes v. Moore*, 11 A. R. 569.

#### VIII. PERFORMANCE.

The plaintiff agreed to purchase from the defendant 76 shares of stock in the Globe Printing Company, and gave to the defendant his note, payable in two years, for the price of the shares, which were transferred to him. At the defendant's request he then pledged these 76 shares, and, as the jury found, lent the defendant 44 other shares of his own, to pledge to a bank, which discounted the note for the defendant. The jury also found that it was a condition of the purchase that the defendant, who had a large interest in the Globe Printing Co., should keep the plaintiff in the position which he occupied as managing director of the Globe Printing Co., at a fixed salary. The defendant at the maturity of the note retired it, and took an assignment to himself of the 120 shares. The plaintiff having been afterwards dismissed from his position as managing director, brought this action for a return of the 44 shares, on the ground that the purpose for which they had been pledged, (viz: the raising of money by the defendant for Hon. George Brown's estate,) had been fulfilled; and for a return of the note, and to be relieved from the purchase of the 76 shares, on the ground that the condition of the purchase, (viz: his being retained in office,) had not been fulfilled, but had been broken by the defendant's procuring his dismissal:—Held, that as there had been a partial performance of the defendant's agreement, by retaining the plaintiff in office for the period within which the 76 shares were to have been paid for, there could be no rescission of the whole contract; but that the plaintiff—the finding of the jury as to the 44 shares not having been moved against—was entitled to a return of these shares, and the defendant to judgment for the price of the 76 shares; and that the plaintiff's remedy, if any, for wrongful dismissal was by an independent action:—Held also, that the defendant having performed his portion of the agreement, the Statute of Frauds, as regards agreements not to be performed within a year, was not applicable to the undertaking to keep the plaintiff in office. *Brown v. Nelson*, 7 O. R. 90—C. P. D.

In order to recover in an action for non-performance of a contract to do work, the plaintiff must shew a willingness and readiness on his part to perform, and on the defendant's part a distinct and unequivocal absolute refusal, and that such refusal was treated and acted upon by the plaintiff; for, if after refusal, he continue to urge or demand compliance with the contract, he must be deemed as considering it as not at an end. *McLellan v. Winston et al.*, 12 O. R. 431—C. P. D.

In this case the plaintiff set up a contract made with defendants, to cut and lay down on the defendants' limits a quantity of ties; that he was to ship his outfit to Port Arthur, where he was to receive instructions from defendants as to the means and way of forwarding same to the place where the work was to be performed. The plaintiff sent his outfit to Port Arthur, and claimed that defendants neglected and refused to give such instructions and refused to carry out the contract whereby the plaintiff was damaged:—Held, that the evidence disclosed that the plaintiff himself was not ready and willing to perform the contract; and further, if a refusal to perform by defendants was proved, that it was not treated and acted upon by plaintiff as such, but thereafter he continued to treat the contract as still subsisting:—Held, therefore, the action failed. *Id.*

See *Spears v. Walker*, 11 S. C. R. 113, p. 93.

#### IX. RESCINDING CONTRACT.

On the 2nd August, 1878, H. C. & F. entered into a contract with Her Majesty to do the excavation, &c., of the Georgian Bay branch of the Canada Pacific Railway. Shortly after the date of the contract and after the commencement of the work, H. C. & F. associated with themselves several partners in the work, amongst others S. & R. (respondents), and on 30th June, 1879, the whole contract was assigned to S. & R. Subsequently, on the 25th July, 1879, the contract with H. C. & F. was cancelled by Order in Council on the ground that satisfactory progress had not been made with the work as required by the contract. On the 5th August, 1879, S. & R. notified the Minister of Railways of the transfer made to them of the contract. On the 9th August the Order in Council of 25th July was sent to H. C. & F. On the 14th August, 1879, an Order in Council was passed stating that as the government had never assented to the transfer and assignment of the contract to S. & R., the contractors should be notified that the contract was taken out of their hands and annulled. In consequence of this notification, S. & R., who were carrying on the works, ceased work, and with the consent of the Minister of Public Works, realized their plant and presented a claim for damages, and finally H. C. & F. and S. & R. filed a petition of right claiming \$250,000 damages for breach of contract. The statement in defence set up *inter alia*, the 17th clause of the contract which provided against the contractors assigning the contract, and in case of assignment without Her Majesty's consent, enabled Her Majesty to take the works out of the contractors' hands, and employ such means as she might see fit to complete the same; and in such case the contractors should have no claim for any further payment in respect of the works performed, but remain liable for loss by reason of non-completion by the contractor. At the trial there was evidence that the Minister of Public Works knew that S. & R. were partners, and that he was satisfied that they were connected with the concern. There was also evidence that the department knew S. & R. were carrying on the works, and that S. & R. had been informed by the Deputy Minister of the department that all that was necessary to be officially recognized as com-



tractors, was to send a letter to the government from H. C. & F. In the Exchequer, Henry, J., awarded the plaintiffs £171,040.77 damages. On appeal to the Supreme Court of Canada it was Held, reversing the judgment of Henry, J., (Fournier and Henry, J.J., dissenting,) That there was no evidence of a binding assent on the part of the Crown to an assignment of the contract to S. & R., who therefore were not entitled to recover. 2. That H. C. & F., the original contractors, by assigning their contract put in the power of the government to rescind the contract absolutely, which was done by the Order in Council of the 14th August, 1871, and the contractors under the 17th clause could not recover either for the value of work actually done, the loss of prospective damages, or the reduced value of the plant. *Regina v. Smith*, 10 S. C. R. 1.

See also *Petrie v. Guelph Lumber Company*, 11 S. C. R. 450.

#### CONTRACTOR.

See WORK AND LABOUR.

#### CONTRIBUTION.

See INSURANCE.

#### CONTRIBUTORIES.

See CORPORATIONS.

#### CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

#### CONVERTED ELECTIONS.

I. MUNICIPAL—See MUNICIPAL CORPORATION.

PARLIAMENTARY—See PARLIAMENTARY ELECTIONS.

#### CONVERSION.

I. OF CHATTELS, 99.

II. OF REALTY INTO PERSONALTY, 102.

##### I. OF CHATTELS.

The plaintiff was executor of H. D., widow of T. D., whose executor the defendant was. The plaintiff claimed a piano in the house lately occupied by the widow, of which the defendant had the key. At an interview between the plaintiff and defendant the latter claimed the piano, but said he was willing to leave the question of the ownership to a person to be named. The plaintiff left him, promising to write, and afterwards did write, saying he had decided to bring the matter before the proper court. Subsequently the plaintiff's solicitor wrote the defendant offer-

ing to release all demands upon the defendant giving up all claim to the piano, to which the defendant's solicitor answered that he could not comply with the demand. The defendant commenced an action in which the title to the piano would come in question. The plaintiff's solicitor having again written to ask whether possession of the piano would be given, the defendant's solicitor wrote that it was perfectly safe where it was, and that the action commenced would decide the question. He also wrote that the plaintiff would not have to put the law in motion.—Held, in an action of replevin, assuming the piano to be the plaintiff's, that there was no evidence of trespass or conversion to support the affirmative of the issue, that the defendant did not take or detain the piano. *Schlaffer v. Dumble*, 5 O. R. 716—Q. B. D.

B. having possession of certain goods of S., S. demanded them of him on December 23rd. B. refused to allow the more bulky goods to be removed until after Christmas, on the ground that it would interfere with his own trade. On December 24th, S. commenced this action for damages, on the ground of wrongful conversion and detention of the goods by B. On December 26, B. notified S. that he could remove the remainder of the goods. S. thereupon sent for them, but finding some of them had been seized under process of attachment out of the Division Court, removed the rest, and afterwards contested in the Division Court the ownership of those seized.—Held, affirming the judgment of the Master in Ordinary, that S. was entitled to damages for the detention of the goods on December 23rd, but the measure of that damage was nominal, and not the value of the goods detained. S. acted on the letter of December 26th, and there did not appear to have been any disposal of the goods in the sense of their destruction or removal adverse to the plaintiff's property, but the plaintiff was ultimately prevented from getting the goods, not because of the defendant's misconduct, but because the claim of attaching creditors intervened. The old learning on the subject of "conversion" need not be imported into the system introduced by the Judicature Act, which provides for redress in case the plaintiff's goods are wrongfully detained, or in case he is wrongfully deprived of them. In all such cases the real question is, whether there has been such an unauthorized dealing with the plaintiff's property as has caused him damage, and if so, to what extent has he sustained damage. *Stinson v. Block*, 11 O. R. 96.—Boyd.

A bank placed an execution against M. the plaintiff's son and one C., in the hands of B., a Division Court bailiff, under which B. seized a stallion as belonging to M., which plaintiff claimed as her property, and which pending interpleader proceedings instituted by her, was placed with an innkeeper. Subsequently an execution by P. against the same parties was placed in the sheriff's hands. P.'s solicitor informed the sheriff of all the circumstances, and he on the 3rd October, obtained from the innkeeper a written undertaking to keep the horse—stated to be under seizure by the sheriff—until further order from the sheriff. On 14th October the sheriff gave notice of plaintiff's claim interpleaded. On 31st October, the Division Court interpleader was de-

cided in the sheriff at one o'clock. The plaintiff did not claim the horse before being taken up until his solicitor did not appear. On 1st November, the horse was paid, but the bank or P. did not pay B. On 1st November, B. made barring to the plaintiff on the 14th November, against the bank for conversion, and the court directing the horse, loss of the horse, after the horse was taken to accept it. No notice of action could be no reason for the reason, and notice of action to connect the fact though the sheriff, and make the kept the horse interfered with it, or in a case, it being at the. *Pardee v. P. D.*

An engine, being shipped by plaintiff, was written order sum agreed on, E.'s portable engine on shipmer's notes within amount to be countermanded, to be at E.'s risk and was to a and the title the tiffs, E. agreeing at the plaintiff in payment the and remove the over same to p condition as re or, and to pa rates or other obtainedness to be ty was put up with right to purchase for one or tiff's wife died on or will appoint or r to sell or aatrix was on 127th April, 18 the right, titl well of himse th the mill bui zine, &c., and t premises, mi After the and the land, m out the F. Lo over paid any cas

ed in the plaintiff's favour. Whereupon the sheriff at once notified the innkeeper that he did not claim any further right to hold the horse. Before being so notified, the plaintiff demanded the horse, but the innkeeper refused to deliver it up until his charges for keeping it were paid, and did not assert any right to hold for the sheriff. On 18th November, part of the charges were paid, but it did not appear whether by the bank or P.; and the balance was subsequently paid by B. On the 3rd November an order was made barring P.'s claim and directing the sheriff forthwith deliver the horse to plaintiff. On 14th November this action was commenced against the bank, P., the sheriff and bailiff, for conversion, and disobedience of the order of the court directing redelivery, claiming the value of the horse, loss of earnings, &c. About 3rd December, after the commencement of the action, the horse was tendered to plaintiff who refused to accept it unless damages and costs were paid. No notice of action was given:—Held, that there could be no recovery against any of the parties for the reason (1) that the bailiff should have had notice of action; (2) that there was nothing to connect the bank or P. with the seizure; (3) that though there was what constituted a seizure by the sheriff, so as to entitle him to interplead and make the innkeeper liable if he had not kept the horse for him, the sheriff in no way interfered with the bailiff's possession or control over it, or in any way converted it to his own use, it being at the time in the custody of the law. *Pardee v. Glass et al.*, 11 O. R. 275—C. P. D.

An engine, boiler, and other machinery, were shipped by plaintiffs to the defendant E. under a written order to ship same to his address as per sum agreed on, viz., \$875; \$225 to be allowed for a portable engine and boiler, and \$650 to be paid on shipment; but, if not settled for in cash or notes within twenty days, then the whole amount to become due. The order not to be countermanded, and until payment the machinery to be at E.'s risk, which he was to insure, and on demand was to assign the policy to the plaintiffs, and the title thereof was not to pass out of plaintiffs. E. agreeing not to sell or remove same without the plaintiffs' consent in writing. On default of payment the plaintiffs could enter and take and remove the machinery, and E. agreed to deliver same to plaintiffs in like good order and condition as received, save ordinary wear and tear, and to pay expenses of removal. Any notes or other security given by E. for his indebtedness to be collateral thereto. The machinery was put up in a mill on premises leased, with right to purchase, by defendant D. to E. for one or five years from 11th March, 1883. E.'s wife died on the 23rd October, 1883, and by her will appointed E. sole executor, giving him power to sell or dispose of any property to which she was or might be entitled. E. by deed of 27th April, 1885, demised and released to D. the right, title, and interest in the premises as well of himself as also as executor, together with the mill built thereon, with the boiler and engine, &c., and on the same day D. leased the premises, mill and machinery, to E. for one year. After the execution of this lease D. mortgaged the land, mill and machinery to the defendant F. Loan Society. The defendant E. never paid any cash, but gave his promissory note

at three months, which was renewed from time to time, but ultimately E. having failed to pay same, the plaintiffs demanded the machinery when D. notified plaintiffs not to remove same, as also did the Society:—Held, that the effect of the transaction was, that the property was in the plaintiffs, and that they were entitled thereto; and that there was an illegal detention by the defendants D. and E. amounting to a conversion; and that the F. Co. by having notified plaintiff not to remove the machinery, were proper parties to the suit to give plaintiffs full relief; and that unless defendants allowed plaintiffs to remove the machinery on demand, the plaintiffs were entitled to recover \$650 with interest, being the price of machinery, and that upon removal of the engine and boiler the sum of \$60 for repairs should be paid by plaintiffs to D. to be repaid to plaintiffs by E. *Polson et al. v. Degey et al.*, 12 O. R. 275—C. P. D.

## II. OF REALTY INTO PERSONALTY.

P. being the owner of certain lands was served by a railway company with notice of expropriation and tendered a sum of money for right of way and damage, which he refused. Subsequently on the application of the company and with the consent of P.'s solicitor the county judge made an order fixing the amount of security to be given for damages, and the price of the land, and giving the company possession upon their paying the amount of such security into a bank to the joint credit of P. and the company. The money was paid in pursuant thereto. An arbitration was then proceeded with, and the compensation to be paid for the value of the land taken and the damage to the remainder, was fixed by the award in separate sums. Proceedings and appeals as to the costs kept the matter open, and the money remained to the credit of the joint account until P. died, after making his will, by which he devised all his real estate to a trustee, and appointed the plaintiff executor. The defendants were appointed trustees in place of the trustee named in the will. Upon a special case for the opinion of the court as to whether the plaintiff as executor of the personal estate or the defendants as trustees of the testator's land, was or were entitled to the sums awarded or any part thereof. It was: Held, that notice to treat having been given, and a claim made by the land owner and refused by the company, and the money having been paid into court and possession taken by the company, these circumstances under the authority of *Nash v. The Worcester Improvement Commissioners*, 1 Jur. N. S. 973, would entitle the land owner to have specific performance against the company, and that therefore the land was converted into money and the plaintiff as executor was entitled to the sums awarded. *Hoskin v. The Toronto General Trusts Co.*, 12 O. R. 480.—Proudfoot.

See *Wool v. Armour*, 12 O. R. 146.

## CONVICTION.

### I. BY MAGISTRATES.

#### 1. Generally.—See JUSTICES OF THE PEACE.

2. *Under Canada Temperance Act 1878, and Liquor License Act 1887—See INTOXICATING LIQUORS.*

3. *Appeal from—See SESSIONS.*

## II. REMOVAL OF—*See CERTIORARI.*

### COPYRIGHT.

To create a perfect right under 38 Vict. c. 88, (Dom.) there should be an assignment in writing of such parts of the book as the owner of the copyright therein is willing to permit his licensee to publish; but without any writing, there may be such conduct on the part of the owner, in assenting to and encouraging the infringement complained of, as to disentitle him to relief in equity by way of injunction. *Allen v. Lyon*, 5 O. R. 615.—Boyd.

G., the writer of a book, printed the book which he intended to copyright with notice therein of copyright having been secured, although he had not at the time actually taken the steps to obtain copyright. He, however, did this merely in anticipation of applying for copyright, which he subsequently applied for and obtained. Furthermore, it appeared to be sanctioned by the practice at the office at Ottawa, and there was no publication of the book till after the statutory title of the author was complete:—Held, that this did not invalidate the patent, and quare whether it was an infringement of sec. 17 of the Act respecting copyrights, 38 Vict. c. 88, (Dom.), so as to subject G. to any penalty. On the title page of the book as published the plaintiff caused these words to be printed: "Entered according to Act of Parliament, in the year 1883, by J. A. Gemmill, in the office of the Minister of Agriculture, at Ottawa:"—Held, that this was sufficient compliance with sec. 9 of the said Act, although the form of words used was not exactly the same as there prescribed, inasmuch as the words "of Canada," omitted after the word "Parliament," were immaterial. General remarks on forms prescribed in various cases by Acts of parliament. *Gemmill v. Garland*, 12 O. R. 139.—Boyd.

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#### I. FORMATION.

##### 1. *Promoters.*

##### (a) *Fraud and Misrepresentation.*

A suit was brought against a joint stock company, and against four of the shareholders who had been the promoters of the company. The bill alleged that the defendants, other than the company, had been carrying on the lumber business as partners and had become embarrassed; that they then concocted a scheme of forming a joint stock company; that the sole object of the proposed company was to relieve the members of the firm from personal liability for debts incurred in the said business and induce the public to advance money to carry on the business; that application was made to the government of Ontario for a charter, and at the same time a prospectus was issued, which was set out in full in the bill; that such prospectus contained the following paragraphs among others, which the plaintiff alleged to be false: 1. The timber limits of the company inclusive of the recent purchase, consist of 200 square miles, or 142,400 acres, and are estimated to yield 200 million feet of lumber. 2. The interest of the proprietors of the old company in its assets, estimated at about \$140,000 over his

bilities, has at \$105,000, whole of the will be used by the company. 3. The bill will be issued per cent. yet over that amount amongst all the holders of the company bonds during the year per annum, and writing. 5. The company, owing to the lumber market, the profits. The bill further stated the statement of the old company new in the course of issuing, raised conditions made known to the new company, the assets of the company to the Ontario issued but he granted; that it not worth \$140,000 but were worth of the contract of the amount against the directors. The promoters of the company they had honest argument three years ago; 1. Rescued for preference shares the contract to during the year the directors a tion. The company plaintiffs put the ground:—Held, courts below, 2 the plaintiffs company by was because it appeared holders and affidavits after been a representation against the defendants, that in a case of fraud the plaintiffs were entitled to the aid of the Ontario after the prospectus been in the prospectus shareholders were the new company liable for the delinquency; and as to raised condition it showed that the defendants were liable in an amount of \$140,000 over his

bilities, has been transferred to the new company at \$105,000, all taken in paid up stock, and the whole of the proceeds of the preferential stock will be used for the purposes of the new company. 3. Preference stock not to exceed \$75,000 will be issued by the company to guarantee eight per cent. yearly thereon to the year 1880, and over that amount the net profits will be divided amongst all the shareholders pro rata. 4. Should the holders of preference stock so desire, the company binds itself to take that stock back during the year 1880 at par, with eight per cent. per annum, on receiving six months' notice in writing. 5. Even with present low prices the company, owing to their superior facilities, will be able to pay a handsome dividend on the ordinary as well as on the preference stock, and when the lumber market improves, as it must soon do, the profits will be correspondingly increased. The bill further alleged that the plaintiffs subscribed for stock in the company on the faith of the statements in the prospectus; that the assets of the old company were not transferred to the new in the condition that they were in at the time of issuing the prospectus; that the embarrassed condition of the old company was not made known to the persons taking stock in the new company, nor was the fact of a mortgage on the assets of the old company having been given to the Ontario Bank, after the prospectus was issued but before the stock certificates were granted; that the assets of the old company were not worth \$140,000, or any sum over liabilities, but were worthless; and prayed for a rescission of the contract for taking stock, for repayment of the amount of such stock, and for damages against the directors and promoters for misrepresentation. There was evidence to show that the promoters had reason to believe the prospects of the new company to be good, and that they had honestly valued their assets. On the argument three grounds of relief were put forward: 1. Rescission of the contract to subscribe for preference stock. 2. Specific performance of the contract to take back the preference stock during the year 1880 at par. 3. Damages against the directors and promoters for misrepresentation. The company having become insolvent the plaintiffs put their case principally on the third ground:—Held, affirming the judgment of the courts below, 2 O. R. 218; 11 A. R. 336, that the plaintiffs could claim no relief against the company by way of rescission of the contract, because it appeared that they had acted as shareholders and affirmed their contract as owners of shares after becoming aware of the grounds of misrepresentation:—Held, also, as to the action against the defendants other than the company for deceit, that the evidence failed to establish a case of fraudulent misrepresentation as to the assets of the old company to the plaintiffs to succeed as for deceit:—Held, as to the alleged concealment of the mortgage to the Ontario Bank, it having been given after the prospectus was issued, it could not have been in the prospectus, and, moreover, that the shareholders were in no way damaged thereby, as the new company would have been equally liable for the debt if the mortgage had not been given; and as to the concealment of the embarrassed condition of the old company, the evidence showed that the old firm did not believe themselves to be insolvent; and in neither case were they liable in an action of this kind. *Petrie v. Joseph Lumber Company*, 11 S. C. R. 450.

The plaintiffs, formerly owners of a line of steamers, filed the bill in this cause against the defendants, who were formerly owners of another line of steamers, seeking damages in respect of alleged misrepresentations on the part of the defendants as to certain contracts alleged by them to be held in connection with their line, and whereby the plaintiffs alleged they were induced to enter into an agreement with the defendants for the amalgamation of the two lines, and the formation in connection with the defendants of a joint stock company to own and run the same. The agreement was made in December, 1876, the charter of the company was obtained in March, 1877, and the plaintiffs became aware of the alleged misrepresentations in May, 1877; notwithstanding which they continued to carry on the business, allotted shares, and allowed dividends to be paid until and after the bill was filed, which was not till February, 1881. The cause was not brought to a hearing till May, 1884, and one of the defendants died while it was pending. The evidence as to the alleged misrepresentations was conflicting:—Held, reversing the decision of Wilson, C. J., 9 O. R. 385, that this was in effect a common law action of deceit, and the misrepresentations alleged required proof of the clearest kind; and, therefore, that the long delay, the conduct of the plaintiffs, and their dealings with the subject matter disentitled them to relief upon the evidence submitted:—Sensible, if the plaintiffs had succeeded, the measure of damages would have been a portion of the profits of the contracts, as represented by the defendants, proportioned to the plaintiffs' shares of the capital stock of the company. Per Hagarty, C. J. O., the action was wrong in its framework; it should have been brought in the name of the company, or on behalf of all its shareholders. Per Burton, J. A., the action could not have been maintained by the company upon representations made to the plaintiffs. *Bentley et al. v. Nelson et al.*, 12 A. R. 50.

Held by Wilson, C. J., that the action could be proceeded with against the surviving defendants. 8 C., 9 O. R. 385.

See also *Morrison et al. v. Earls*, 5 O. R. 434.

#### (b) Other Cases.

Held, reversing the judgment of the Court below, that by reasons of the infancy of one of the five subscribers, the company, which was formed for the purchase of a road under R. S. O. c. 152, had no legal existence at the time of the registration of their declaration of incorporation, and that no subsequent ratification by him after attaining majority could validate his contract. *Hamilton and Flamborough Road Company v. Townsend*, 13 A. R. 534.

Quere, whether a married woman can legally be one of the five members required by R. S. O. c. 152, to form a joint stock company for the purpose of purchasing a road. *Id.*

#### II. Stock.

##### 1. Subscription for.

Shares had been assigned in the Company's books by the managing director in his own name,

as to twenty shares, and as attorney for another, as to thirty, to the defendant, who did not sign the usual formal acceptance for any of them, but a certificate under the corporate seal of the company and the signature of the president, vice-president and secretary of the company was sent to him, certifying that he was the registered owner of the twenty shares; and defendant had, in a bill filed against a third party for fraudulently inducing him to purchase the shares, for which he had paid \$500, admitted that he had purchased the fifty shares:—Held, that defendant was a shareholder as to these fifty shares:—Sembler, that if any further formal acts were required to be done on the part of the defendant to constitute him a shareholder he could be directed to perform them. *Ross et al. v. Machar*, 8 O. R. 417—Q. B. D.

The defendant with others agreed to apply for a patent for a company for manufacturing purposes, under R. S. O. c. 150, and signed a stock list subscribing for certain shares, and agreeing to pay therefor as provided by the Act and the by-laws of the company. Subsequently a petition purporting to be by thirteen of the subscribers, but omitting the defendant's name, was presented to the Lieutenant-Governor of Ontario for a patent incorporating the petitioners and "such others as might become shareholders in the company thereby created a body corporate," &c. The stock list, however, subscribed by the defendant appeared to have been filed in the office of the secretary of State. The petitioners were accordingly incorporated, "and each and all such other person or persons as now is, or are, or shall at any time hereafter become a shareholder or shareholders in the said company under the provisions of the said Act," &c. The defendant did not subsequently to the incorporation subscribe for stock, but on the contrary repudiated his former subscription:—Held, that the defendant was not a stockholder, and was, therefore, not liable for calls on the shares which he purported to have subscribed for. *Tilsenburgh Agricultural Manufacturing Company v. Goodrich*, 8 O. R. 565—Q. B. D.

Where a conditional agreement to take shares in a company is broken the shareholder is freed from liability on such shares. But where the agreement is collateral the shareholder is liable on such shares, but has a right of action for indemnity or damages against such company. *Clarke The Union Fire Insurance Co.—Caston's Case*, 10 P. R. 339—Hodgins, Master in Ordinary.

A contract between a company and a person who makes application for shares must be dealt with as ordinary contracts: there must be an offer by the one to take shares, and an acceptance of such offer by the company. One H., subscribed for shares in a company, but no shares were formally allotted to him by the directors. Calls were made by the general manager, and notices of such calls were sent by the secretary to, and received by H. but the calls had never been authorized by the directors:—Held, that the unauthorized acts of the officers named could not be construed to be an allotment, or a notification of an allotment of stock, so as to bind the company or prove an acceptance of H.'s subscription for stock. *Re Bolt and Iron Company—Hovenden's Case*, 10 P. R. 434—Hodgins, Master in Ordinary.

As to rescinding contracts for shares on the ground of fraudulent representation and concealment. See *Petrie v. Guelph Lumber Co.*, 11 S. C. R. 450.

See also Subhead VII., 3., p. 121.

## 2. Calls.

### (a) Notice of.

Per Spragge, C. J. O., and Hagarty, C. J. Notice of a call published in a newspaper in the district is sufficient to render the shareholder residing in that district liable to pay the call, notwithstanding that the notice may not have been published in other districts where stock is held. *Burton and Patterson, J. J. A.* Held that the enactment as to notice ought to be construed strictly; particularly if by a literal reading of the other provision calls were held valid though payable at shorter intervals than thirty days. *Provincial Insurance Co. v. Worts*, 9 A. R. 56; S. C., sub nom *Provincial Insurance Co. v. Cameron*, 31 C. P. 523.

The charter of a company, 35 Vic. c. 104. (Dom.), provided that one month's notice of call "shall be given." Per O'Connor, J., sending such notice by post was not a compliance with this provision. *Ross et al. v. Machar*, 8 O. R. 417.

### (b) Other Cases.

The plaintiffs by their Act of incorporation were authorized to call in the stock by instalments as the directors should appoint, subject to a proviso that "no instalment shall exceed ten per cent., or be called for or become payable less than thirty days after public notice shall have been given in one or more of the several newspapers published in every district where stock may be held:—Held, per Spragge, C. J. O., and Hagarty, C. J., that the times fixed for the payment of instalments need not be thirty days apart; but that instalments might be made payable at any time, provided no call exceeded ten per cent., and thirty days intervened between the date of notice of the call and the day on which it was payable. Per *Burton and Patterson, J. J. A.*, that no instalment could lawfully be made payable in less than thirty days from the day for payment of the next preceding instalment. *Provincial Insurance Co. v. Worts*, 9 A. R. 56; S. C., sub nom *Provincial Insurance Co. v. Cameron*, 31 C. P. 523.

Under the circumstances shewn in the evidence set out in the report:—Held, O'Connor, J., dissenting, that secondary evidence of the contents of the minute book of the company, shewing the making of certain calls, was improperly rejected. *Ross et al. v. Machar*, 8 O. R. 417—Q. B. D.

See *Fild v. Galloway*, 5 O. R. 502, p. 112; *Ross et al. v. Machar*, 8 O. R. 417, p. 126; *Re Bolt and Iron Company—Hovenden's Case*, 10 P. R. 434, p. 126.

## 3. Transfer.

Bank of L. brought an action against S., the appellant, (defendant,) as shareholder, to recover a call of 10 per cent. on twenty-five shares held

by him in the defence on equity "that before the defendant and for valid transfer and stock which person authorized the same, and that the said share necessary for the said share without legal record such in the books of transfer. And Bank of L. should make and contain all things required the said transfer Bank of L. be of this suit." to this plea, but took place before attempted to transfer of the special general Bank of L. he resolved "that the Bank of L. liquidation, but obtain a loan enable the bank that the shareholder without assigning interest due on to execute, who The defendant when this resolution from the evidence loan of \$80,000 security of one bonds to lesser including the debt by B. when they did in 1877 standing, and defendant and sent to the market favour they were complete the transfer L. refused to pay defendant was not to they make any edness on his part also from the evidence resolution of the to the sale by number of other the books of the Bank of L. been S., the respondent and carry on the was found by the court; but the (James, J., dissenting) to set aside the preme Court of Scotland, that the could not bind a meeting, even under the facts defendant could not

by him in that bank. By the 7th plea, and for defence on equitable grounds, the defendant said, "that before the said call or notice thereof to the defendant, the defendant made, in good faith and for valid consideration in that behalf, a transfer and assignment of all the shares and stock which he had held in the Bank of L. to a person authorized and qualified to receive the same, and the defendant and the transferees of the said shares or stock did all things which were necessary for the valid and final transferring of the said shares or stock; but the said plaintiffs, without legal excuse and without reason, refused to record such transfer, or to register the same in the books of the bank, or to recognize the said transfer. And the defendant prays that the said Bank of L. shall be compelled and decreed to make and complete the said transfer, and to do all things required on its part to be done to make the said transfer valid and effectual, and the said Bank of L. be enjoined from further prosecution of this suit." The plaintiffs filed no replication to this plea, but at the trial of the action, which took place before James, J., without a jury, they attempted to justify the refusal to permit the transfer of the shares upon the ground that at a special general meeting of the shareholders of the Bank of L. held on the 26th June, 1873, it was resolved "that, in the opinion of the meeting, the Bank of L. should not be allowed to go into liquidation, but that steps should be taken to obtain a loan of such sum as may be necessary to enable the bank to resume specie payments, and that the shareholders agree to hold their shares without assigning them until the principal and interest due on such loan shall be fully paid, and to execute, when required, a bond to that effect." The defendant was not present at the meeting when this resolution was passed, and it appeared from the evidence that the Bank of L. effected a loan of \$80,000 from the Bank of S. upon the security of one B., who, to secure himself, took bonds to lesser amounts from other shareholders, including the defendant, whose bond was released by B. when the defendant sold his shares. This he did in 1877 to certain persons then in good standing, and powers of attorney executed by defendant and the purchasers respectively, were sent to the manager of the Bank of L., in whose favour they were drawn, to enable him to complete the transfer. The directors of the Bank of L. refused to permit the transfer, but the defendant was not notified of their refusal, nor did they make any claim against him for any indebtedness on his part to the bank; and it appeared also from the evidence that subsequently to the resolution of the 26th of June, 1873, and prior to the sale by defendant of his shares, a large number of other shares had been transferred in the books of the bank. In October, 1879, the Bank of L. became insolvent, and the Bank of S., the respondents, obtained leave to intervene and carry on the action. At the trial a verdict was found by the judge in favour of the appellant; but the Supreme Court of Nova Scotia, (James, J., dissenting,) made absolute a rule nisi to set aside the verdict. On appeal to the Supreme Court of Canada, it was:—Held, reversing the judgment of the Supreme Court of Nova Scotia, that the resolution of the 26th June, 1873, could not bind shareholders not present at that meeting, even if it had been acted upon, and under the facts disclosed in evidence the defendant could not be deprived of his legal right un-

der the Banking Act to transfer his shares and to have the transfer recorded in the books of the bank; and the 7th plea was therefore a good equitable defence to the action. *Smith v. Bank of Nova Scotia*, 8 S. C. R. 558.

See *Thompson et al. v. The Canada Fire and Marine Insurance Company et al.*, 6 O. R. 291, 9 O. R. 284, p. 115; *Re Cole and The Canada Fire and Marine Insurance Company—Close's Case*, 8 O. R. 92, p. 121.

#### 4. Cancelling.

The defendant, an original stockholder in a joint stock company, his stock being fully paid up, was elected a director, after a statement prepared by the company's secretary had been published by them, setting forth that the company was in a flourishing condition earning a ten per cent. dividend. On the faith of such statement defendant subscribed for new shares in the company, but soon afterwards suspecting that the statement was incorrect, he threatened legal proceedings to compel them to cancel the stock, whereupon a resolution was passed directing the books to be examined, and on such examination the statement was found to be false, and the company practically insolvent. A meeting of the shareholders was then called, and a by-law passed cancelling the stock. After the defendant's subscription for the new stock, and before the cancellation, as also before the defendant became aware of the falsity of the statement, the plaintiff became a creditor of the company. The plaintiff after such cancellation, issued a writ and obtained a judgment against the company, and then sued defendant for the amount of the new stock unpaid by him:—Held, that the plaintiff could not recover: that there was power to cancel the stock: that the cancellation was duly made; and that the defendant was not guilty of any laches. *Wheeler and Wilson Manufacturing Company v. Wilson*, 6 O. R. 421—C. P. D.

#### 5. Increasing.

The Ontario Wood Pavement Company, incorporated under 27 & 28 Vic., c. 23, with power to increase by by-law the capital stock of the company "after the whole capital stock of the company shall have been allotted and paid in, but not sooner," assumed to pass a by-law increasing the capital stock from \$130,000 to \$250,000 before the original capital stock had been paid in. P. et al., execution creditors of the company, whose writ had been returned unsatisfied, instituted proceedings by way of *sci. fa.* against A. as holder of shares not fully paid up in said company. It appeared from an examination of the books that the share alleged to be held by A. were shares of the increased capital and not of that originally authorized:—Held, affirming the judgment of the Court of Appeal, that as there was evidence that the original nominal capital of \$130,000 was never paid in, the directors had no power to increase the stock of the company, and as the stock held by A. consisted wholly of new unauthorized stock, P. et al. were not entitled to recover. Gwynne, J., dissenting, on the ground that the objection not having been taken by the defendant or tried, the court, under sec. 22, R. S. O., c. 38, should put the



questions of fact upon which the validity and sufficiency of the objections suggested by the court rested, into a course for trial in due form of law.) *Page v. Austin*, 10 S. C. R. 132.

Where a statutory liability is attempted to be imposed on a party which can only attach to an actual legal shareholder in a company, he is not estopped by the mere fact of having received transfers of certificates of stock from questioning the legality of the issue of such stock. Per Strong and Henry, J.J., (Gwynne, J., contra), that although A., a mortgagee of the shares and not an absolute owner, had taken a transfer absolute in form and caused it to be entered in the books of the company as an absolute transfer, he was not estopped from proving that the transfer of the shares was by way of mortgage. *Ib.*

Held, affirming the judgment of the C. P. D., 11 O. R. 444, Burton J. A., dissenting, that the duty of the Provincial Secretary of Ontario in issuing the notice of the increase of the capital stock of an incorporated company required to be given under 27 and 28 Vict. c. 23, s. 5, sub-s. 18, complied with he has not any discretion in the matter, but must issue the notice. *Re The Massey Manufacturing Company*, 13 A. R. 446.

Held, Burton, J.A., doubting that the power conferred of increasing the capital stock by sub-s. 16, 17, and 18 of s. 5, is a general power not limited to a single occasion. *Ib.*

Held, that there is nothing in the Act which makes a prior subscription and payment of the new stock, or a part of it, a pre-requisite to the right of the company to have the notice published. Per Burton, J.A. The object with which the statute was passed was to avoid the necessity and expense of applying in each case to the legislature for a charter, thus delegating the power to grant the same to the executive under certain conditions; there was, therefore, conferred upon the executive the same right to control the increase of capital, as without such statute would have remained with the legislature. *Ib.*

Held, that mandamus was the proper mode of enforcing the issue of the notice. *Ib.*, S. C. 11 O. R. 444—C. P. D.

### III. LIABILITY OF SHAREHOLDERS TO CREDITORS.

After plaintiff had commenced an action against the defendant to recover from him in respect of his unpaid stock in a joint stock company the sum of \$442.23, being the amount of an unsatisfied judgment recovered by the plaintiff against the company for \$4,333.08, and assigned it to one G., who assigned part of the money recovered to the extent of \$500, the amount of the defendant's unpaid stock, to the defendant. The object of the assignment to the defendant was to give him priority over the plaintiff's claim:—Held, that the procuring of such assignment by defendant being for such purpose, and being a voluntary act on defendant's part, and with notice of plaintiff's claim, did not constitute a defence to it; but—semble, if the act of had accrued to the defendant in his own right, although after action brought, it would have been otherwise. G. assigned the remainder of his judgment to M., who after the commencement of the plaintiff's action, and with knowledge thereof, recovered a

judgment against defendant for \$526.21 without defence, and to give M. a preference in respect of his unpaid stock, which defendant paid to M., who released the company from their liability on the judgment so recovered against them to the extent of \$500:—Held, that the judgment so recovered, and the payment thereunder, constituted a good defence to the plaintiff's claim; and that the prior commencement of the plaintiff's action was immaterial. *Fitch v. Gallouay*, 5 O. R. 502—C. P. D.

See *Wheeler & Wilson Manufacturing Company v. Wilson*, 6 O. R. 421, p. 110; *Brice v. Munro et al.*, 12 A. R. 453, p. 128; *Page v. Austin*, 10 S. C. R. 132, p. 111. See also *Harvey v. Harvey*, 9 A. R. 91.

See also subhead VII. 3, p. 121.

### IV. DIRECTORS AND OFFICERS.

#### 1. Meeting for Election of Directors.

The plaintiffs were a company incorporated under the The Canada Joint Stock Companies' Act, 40 Vict. c. 43. By sec. 29, the directors were to be elected by the shareholders in general meeting assembled, at such times as the by-laws of the company should prescribe; and by sec. 30, in default of other express provisions therein in the letters patent or by-laws, such election should take place yearly, upon notice; that at all general meetings each shareholder who had paid all calls should be entitled to vote on each share held by him; and that all questions should be determined by the majority of votes. By sec. 31, the failure to elect directors at the proper time should not dissolve the company; but such election should take place at any general meeting of the company duly called for the purpose, the retiring directors to continue in office until the election of their successors. By sec. 32, power is given to the directors to pass by-laws for, amongst other things, the time, &c., of the holding of the annual meeting of the company, the calling of meetings, regular and special, of the directors and of the company, the quorum at such meetings; but every such by-law, unless confirmed at a general meeting of the company, should only be in force until the next annual meeting thereof; one-fourth in value of the shareholders could at all times call a special meeting for the transaction of such business as might be specified in the notice given therefor. By a by-law passed by the directors the last Tuesday in September was fixed as the date of the annual general meeting, and the quorum for such meeting was to consist of five members; but at a special meeting they were required in addition to represent one-third of the capital stock. In 1884 there was no election of directors at the proper time, owing to the effect where the meeting was to have been held therefor being locked up and the defendant refusing to attend the meeting or give up the books, &c. and in October a special general meeting of the shareholders was held, called on notice, stating the object thereof, on a requisition by one-fourth in value of the shareholders, and directors were elected, who appointed a new secretary. At the meeting there were present three-fourths of the qualified vote and one-third of the subscribed capital, but considerably less than that amount of the nominal capital. In an action by the com-

pany against the books, &c., to set up as a defence, as he all the new secret there was not a act business; there was aut meeting for the was duly called holders:—Held by-law determin proceedings for meetings of th there was a prop under the by-law such one-third it would have b 32. Per Rose, general meeting the purpose," pr which may be ex Held, also, that must be deemed books, &c.; that tors de facto, an and an officer of fitted to withh pay. In any e the proper way d tors, which shou or set aside the Company (Limite P. D.

In a sheriff's Bunk claimed the rity for advances any incorporate due of warehouse and deposited w as such security. "The directors s to administer the may make \* which the compa by sub-s. 2 of s. 2 given to the dir by-law approved in value of the sh pledge the real an any to secure a was no by-law i directors was wel of the transaction thecation of the done:—Held, th passed to the ba any could not ha without satisfying the execution erec as to property sei Held, also, that speaking, requisit complaint had be any of its shareh larity or inform the case here, an be allowed to in tion of fraud or pable sense:—He



pany against defendant for the non-delivery of the books, &c., to the new secretary, the defendant set up as a defence that he was still secretary, because, as he alleged, the directors who appointed the new secretary were not duly elected, and that there was not a quorum at the meeting to transact business:—Held, under the circumstances, there was authority to call the special general meeting for the election of directors; and that it was duly called by the proper number of shareholders:—Held, also, that the directors could by by-law determine the quorum and all other formal proceedings for the control and conduct of the meetings of the board and shareholders; that there was a proper quorum present at the meeting under the by-law; and if the by-law had required such one-third to be of the whole capital stock it would have been ultra vires as opposed to sec. 32. Per Rose, J., the words of sec. 31, "any general meeting of the company duly called for the purpose," properly describe a special meeting, which may be called as provided by by sec. 32:—Held, also, that on the evidence the defendant must be deemed to have unlawfully detained the books, &c.; that there was an election of directors de facto, and a suit in the company's name; and an officer of the company could not be permitted to withhold what belonged to the company. In any event the defence set up was not the proper way of testing the election of directors, which should have been by motion to stay or set aside the proceedings. *The Austin Mining Company (Limited) v. Gemmell*, 10 O. R. 696—C. P. D.

## 2. Powers of.

In a sheriff's interpleader, the Merchants Bank claimed the property in question as security for advances made by them to a certain company incorporated under R. S. O. c. 150, by virtue of warehouse receipts covering the property, and deposited with them by the said company as such security. Under R. S. O. c. 150, s. 28, "The directors shall have full power in all things to administer the affairs of the company, and may make \* \* any description of contract which the company may, by law, enter into; and by sub-s. 2 of s. 30 of that Act express power is given to the directors under the sanction of a by-law approved of by not less than two-thirds in value of the shareholders to hypothecate and pledge the real and personal property of the company to secure any sum borrowed, &c. There was no by-law in this case, but the board of directors was well aware of the nature and extent of the transaction with the bank and the hypothecation of the goods, and adopted what was done:—Held, that the property in the goods passed to the bank, and inasmuch as the company could not have resumed possession thereof without satisfying the banks' lien, neither could the execution creditors, who had no higher rights as to property seized than the original debtor; Held, also, that even if a by-law were, strictly speaking, requisite in such a case, yet, where no complaint had been made by the company, or any of its shareholders, because of any irregularity or informality in what was done, as was the case here, an execution creditor could not be allowed to interfere, there being no imputation of fraud or illegality in its broad and culpable sense:—Held, however, upon the evidence

in this case, the depositing of the goods in a warehouse, and the raising of money upon the security thereof, seemed to be an important constituent for the successful prosecution of the company's business, and to be such a matter as would fall within the competence of the directors to cause to be done through their manager, as was the course of dealing here. *Merchants' Bank of Canada v. Hancock et al.*, 6 O. R. 285.—Boyd.

The judgment in an action by the Bank of Toronto against the C. Railway Company, directed a reference as to who, other than the plaintiffs, were the holders of bonds of the defendant company of the same class, and an account of what was due to such bondholders, and it appeared before the Master that the managing director of the company had issued a great number of debentures of the same class as the plaintiffs' to J. H. S., G. J. S., and J. B., who were themselves directors of the company at a discount of 25 per cent., in satisfaction of their claims against the company. The plaintiffs thereupon who had obtained their debentures subsequently, contended that these parties could only claim the amount actually advanced by them, and that they could not as directors, sell the debentures to themselves at a discount:—Held, affirming the decision of the Master in Ordinary, that inasmuch as the company did not complain of the transaction, nor any shareholders, and inasmuch as the transaction was not ultra vires, it was not competent for the holders of the debentures of the same class, such as the plaintiffs were, to impugn the position of J. H. S., G. J. S., and J. B. If the directors abused their position so as to get an advantage at the expense of the company, it was for the corporation or its corporators to complain. To permit the plaintiffs to attack them on this ground would be to recognize the validity of the transfer of a right of action to complain of a fraud, actual or constructive. *Bank of Toronto v. Coburn, Peterborough and Marquette Railway Company et al.*, 10 O. R. 376.—Boyd.

The general manager of a company had authority to do acts which occasionally required legal advice:—Held, that he had implied authority to retain a solicitor whenever in his judgment it was prudent to do so, but that such authority ceased on the suspension of the company. *Clarke v. The Union Fire Insurance Co.—Custom's Case*, 10 P. R. 339.—Hodgins, Master-in-Ordinary.

Where the directors of a company had power to appoint officers and agents and dismiss them at pleasure:—Held, that their appointment of a solicitor need not be under the corporate seal. *Ib.*

A solicitor for a company is entitled to charge such company for special work and journeys undertaken at the request of individual directors and the general manager. *Ib.*

A board of directors cannot delegate to its officers or to third parties its statutory powers to allot stock, or make calls. *Re Bolt and Iron Company—Horender's Case*, 10 P. R. 434.—Hodgins, Master-in-Ordinary.

See *The Austin Mining Company (Limited) v. Gemmell*, 10 O. R. 696, p. 113; *In re Briton Medical and General Life Association (Limited)*, 11 O. R. 478, p. 127; *Whiting et al. v. Hovey et al.*, 13 A. R. 7, p. 31; *Canada Central R. W. Co. v. Murray*, 8 S. C. R. 313, p. 11.

### 3. Personal Liability of.

The plaintiffs were the owners of certain boats, docks, &c., and being desirous of giving up their business proposed to sell all their rights in their charter, boats, &c., to a company to be thereafter incorporated as the "Thames River Navigation Company." The proposal was assented to by the defendants and others subscribing to the stock of the new company, and the purchase money was to be paid out of the funds of the latter when formed. Upon this understanding the vessels were delivered to the defendants on behalf of all parties, and the sum of \$3,500 on account of such purchase was paid out of the money paid in by persons subscribing for shares in the new company. Before the completion of repairs necessary to render the boats serviceable, one of them was destroyed by an unexpected flood, in consequence of which, proceedings for the incorporation of the new company were abandoned. Held, reversing the judgment of the court below, 9 O. R. 754, that the defendants were not liable for the balance of the purchase money, as the circumstances showed there had never been a completed sale and purchase. The only contract proved, was a provisional one to take effect upon the incorporation of the new company, and the delivery which had taken place, was not in pursuance of a contract of sale, but simply to enable the repairs upon the vessels to be effected. *Thames Navigation Company (Limited) v. Reid et al.*, 13 A. R. 303.

When the shareholders of a certain company brought an action against the company and certain of its directors, alleging that the latter, being a majority of the directorate, had negotiated a transfer of a number of their own shares to one C., who subsequently became manager, knowing him to be a man of no sufficient means to pay calls thereon, but wishing to escape liability for certain impending calls; and claimed that the said directors should make good to the company or to them the amount of calls due upon the shares so transferred to C. and unpaid by him; and the said directors alleged acquiescence and laches on the plaintiffs part in respect of the matters complained of; and the plaintiffs proved the transfer as alleged:—Held, reversing the judgment of Boyd, C., 6 O. R. 291, that the defendant directors in allowing the transfers complained of, were upon the evidence guilty of no fraud towards the shareholders, and that such act was within the scope of the prescribed powers and duties of directors, and as neither fraud nor a breach of trust was proved, the cross-appeal was allowed, and the action dismissed with costs. *Thompson et al. v. The Canada Fire and Marine Insurance Company et al.*, 9 O. R. 284—Chy. D.

Liability on promissory note. See *Brown v. Howland*, 9 O. R. 48 p. 48.

### 4. Contracts between Directors and Company.

J. H. B., one of the defendants, a director of the defendant company, personally owned a vessel "The United Empire" valued by him at \$150,000; and was possessed of the majority of the shares of the company, some of which he had assigned to others of the defendants in such numbers as qualified them for the position of directors of the company, the duties of which they discharged. Upon a proposed sale and purchase

by the company of the vessel "The United Empire" the board of directors (including J. H. B.), at their board meeting adopted a resolution approving of the purchase by the company of such vessel; and subsequently at a general meeting of the shareholders, including J. H. B. and those to whom he had transferred portions of the stock, a like resolution was passed, the plaintiff alone dissenting:—Held, reversing the judgment of Boyd, C., 6 O. R. 300, that although the purchase on the resolution of the directors alone might have been avoided, the resolution of the shareholders validated the transaction, and that there is not any principle of equity to prevent J. H. B. in such a case from exercising his rights as a shareholder as fully as other members of the company. Per Burton and Osler, J.J.A. The dealings of this nature the relative positions of the shareholders and directors are those of principals and agents, not those of cestui que trust and trustees. *Bratty v. North Western Transportation Co.*, 11 A. R. 205. Reversed in Supreme Court, (not yet reported), and leave granted to appeal to Privy Council.

### V. LIABILITY OF CORPORATION TO MEMBERS.

The plaintiff during his initiation as a member of the defendants' lodge, in the presence of the principal officers and a number of members, constituting a full and perfect meeting, was injured through the rough usage of some of the members. It appeared that this and other proceedings were taken with the knowledge of all those who were present, and that somewhat similar proceedings had happened on the occasion of other initiations, and that they were allowed and not checked:—Held, that they must be taken to have been done with the consent of the corporate body, and that the defendants were liable in damages for the injuries sustained. *Kirner v. The Phoenix Lodge, I. O. O. F.*, 7 O. R. 377—Q. B. D.

The defendants' act of incorporation provided for the appointment of a committee of management to manage the affairs, &c., of the corporation, and, under a by-law, the committee were to consider and report on all offences under the by-laws, if submitted to them, and to call a special meeting of the corporation to pass judgment thereon. Power was also given by the Act of incorporation to expel members as by the by-laws should be determined. By by-law 13 all complaints to the committee or corporation were to be in writing. By by-law 21 any member complaining against, might have a hearing before the corporation, and if the complaint be proved, a vote should be taken by ballot—by a two-thirds majority of those present and voting being required—first, for the forfeiture of the seat, and then if lost for suspension. By by-law 24, a member becoming bankrupt or insolvent, should not be entitled to take his seat as a member of the corporation, or be present at any meeting thereof; and such seat should revert to the corporation to be sold by them, if the member be not re-admitted within six months from the date of insolvency, and the proceeds applied as directed therein. In November, 1883, without any complaint in writing or notice to the plaintiff, a hearing before the corporation, but on the charge made and secretary, whom the committee had instructed to make enquiries, reporting that plaintiff

was offering the secretary, to plaintiff, and on the altered by statute. Nothing further when in consequence the plaintiff's members who his condition, president complained insolvent in October disqualification, asking for an in which was had, the complaint was complainants were steps were taken for suspension:—law 24, did not result to a definite rupt or insolvent the issue of a writ plaintiff did not from this the defendant illegal and void, complaint that go to interfere; and to be managed by responsible for the complaint made one, but merely a as illegal act; been by ballot:—plaintiffs' proceedings till of his seat, to act most detrimental, vented him from broker; and he was damages for the. Remarks as to the plaintiffs acting as, and if deemed proper two-thirds deemed neither p. 1.—In the absence of certain the fact the jury herein the was conclusive. *Exchange*, 8 O. R.

### VI. CONFESSION.

To an action on by T. and W. M. over money claimed by C. C. railway never indebted, and under which the following Memo. of fencing to Renfrew. T. next spring for C. boards 6 inches apart, for \$1.25 per for lumber.

F. controlled in publicly appeared, and acted as manager of the company, and tractor for the bus and W. M. built t

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tiff was offering to compromise with his creditors, the secretary, by order of the committee, wrote to plaintiff, calling his attention to by-law 24; and on the same day the list of members was altered by striking out the plaintiff's name. Nothing further was done until March following, when in consequence of a correspondence between the plaintiff's solicitors and the defendants, those members who had previously reported on plaintiff's condition, made a written complaint to the president complaining of the plaintiff having been insolvent in October and November, and of his disqualification thereby under by-law 24, and asking for an investigation by the corporation, which was had, and by an open vote of 15 to 6, the complaint was held to be proved, the two complainants voting with the majority. No steps were taken to declare the seat forfeited or for suspension:—Held, that insolvency under by-law 24, did not refer to a condition of insolvency, but to a definite act of insolvency under a bankrupt or insolvent Act, e. g., by an assignment or the issue of a writ of attachment; and therefore plaintiff did not come within its terms; but apart from this the defendants' proceedings were clearly illegal and void, for in November there was no complaint that gave the committee jurisdiction to interfere; and as the defendants' affairs were to be managed by the committee, they were responsible for the committee's acts; while the complaint made in March was not a bona fide one, but merely an attempt to support the previous illegal act; and also the vote should have been by ballot:—Held, also, that though defendants' proceedings were abortive to deprive plaintiff of his seat, the erasure of his name was an act most detrimental to the plaintiff, as it prevented him from carrying on his business as a broker; and he was therefore entitled to recover damages for the loss he had sustained thereby. Remarks as to the impropriety of the two complainants acting as judges on their own complaint; and if deemed present there would not be the requisite two-thirds majority, but otherwise if deemed neither present nor voting. Per Rose, J.—In the absence of a by-law providing for ascertaining the fact of insolvency, the finding of the jury herein that plaintiff was not insolvent was conclusive. *Temple v. The Toronto Stock Exchange*, 8 O. R. 705—C. P. D.

#### VI. CONTRACTS WITH CORPORATIONS.

To an action on the common counts brought by T. and W. M. against the C. C. R. Co., to recover money claimed to be due for fencing the line of C. C. railway, the C. C. R. Co. pleaded never indebted, and payment. The agreement under which the fencing was made is as follows:—“Memo. of fencing between Muskrat river, east, to Renfrew. T. and W. M. to construct same next spring for C. C. R. Co., to be equal to 5 boards 6 inches wide, and posts 7 and 8 feet apart, for \$1.25 per rod, company to furnish cars for lumber.

“(Signed) T. & W. M.  
A. B. F.”

F. controlled nine-tenths of the stock, and publicly appeared to be and was understood to be, and acted as managing director or manager of the company, although he was at one time contractor for the building of the whole road. T. and W. M. built the fence and the C. C. R. Co.,

have had the benefit thereof ever since. The case was tried before Patterson, J., and a jury, and on the evidence, in answer to certain questions submitted by the judge, the jury found that T. and W. M., when they contracted, considered they were contracting with the company through F., and that there was no evidence that the company repudiated the contract till the action was brought, and that the payments were made as money which the company owed, not money which they were paying to be charged to F. and a general verdict was found for T. and W. M. for \$12,218.51. On appeal to the Supreme Court of Canada:—Held: (affirming the judgment of the court below, 7 A. R. 646), that it was properly left to the jury to decide whether the work performed, of which the C. C. R. Co. received the benefit, was contracted for by the company through the instrumentality of F., or whether they adopted and ratified the contract, and that the verdict could not be set aside on the ground of being against the weight of evidence; Ritchie, C. J., and Taschereau, J., dissenting, on the ground that there was no evidence that F. had any authority to bind the company, T. and W. M. being only sub-contractors, nor evidence of ratification. 2. That although the contract entered into by F. for the company was not under seal, the action was maintainable. *The Canada Central Railway Co. v. Murray*, 8 S. C. R. 313.

#### VII. WINDING-UP ACTS.

##### 1. Application of.

Held, that 45 Viet. c. 23, (Dom.), is retroactive in the sense of applying to companies which have become insolvent before the date of that Act. *Wylde v. Hamilton Mutual Insurance Company*, 6 O. R. 118.—Boyd.

The bank suspended payment September 15th, 1883. Winding-up proceedings were commenced November 22nd, and an order made December 5th. R. & G. H. purchased a stock of hardware held by the bank on which they owed \$14,000 at the time of the suspension. The bank wishing to close the account sold the balance of the stock to A. H. & Co., for \$5700, and agreed to accept in payment cheques of the defendant drawn on his deposit account, and which were drawn on and accepted by the bank on October 31st. For these cheques A. H. & Co. gave their acceptances which were duly paid. Before the stock was delivered R. & G. H. settled the balance of their debt to the bank. In an action by the liquidators of the bank against the defendant to recover back the amount thus paid on the defendant's cheques, under 45 Viet. c. 23, s. 75, (Dom.), it was:—Held, that the plaintiff could not recover, for the defendant had received no valuable consideration from the bank which he should be ordered to repay. The defendant also owed A. H. & Co. a debt, and gave his cheque on the bank for \$92 in part payment thereof, which the bank accepted from A. H. & Co. on October 23rd, in retiring an overdue bill:—Held, that the amount could not be recovered back. On November 19th, defendant sold his cheque for \$320 to his uncle, C., who was the local head of the bank, which cheque was negotiated and accepted by the bank on November 23rd, (after winding-up proceedings had commenced):—Held, that, although it probably was an invalid trans-

saction as far as the person who received the money was concerned, there was no payment to the defendant of anything within the scope and meaning of section 75. *The Exchange Bank of Canada v. Stinson*, 8 O. R. 667.—Boyd.

The bank suspended payment September 15th, 1883. Winding-up proceedings were commenced November 23rd, and an order made December 5th. The defendants U. & S. being depositors in the bank drew a cheque for \$4000 on November 1st, on their deposit account, which was given to D., a debtor of the bank on notes maturing the following December and January. D. gave mortgage security to defendants for the cheque on October 31st. The arrangement was all made about October 5th, although the security was not given until the 31st, and the cheque was not presented to the bank until November 23rd, when it was accepted as payment of the maturing notes. In an action by the liquidators of the bank against the defendants, to which D. was not a party, to recover the amount thus paid on the cheque as having been paid to defendants after the winding-up proceedings were commenced, and being an unjust preference, &c.:—Held, that upon the facts there was no payment by the bank to the defendants, and that the transaction therefore was not within the statute 45 Vict. c. 23, s. 75, (Dom.) C. who was being sued by the bank, obtained defendants' cheque for \$2,118 giving security therefor on November 21st, and retired the notes in suit on November 23rd:—Held, that the defendants could not be ordered to repay the amount of the cheque, as being a wrongful payment under the Act. *The Exchange Bank of Canada v. Connell et al.*, 8 O. R. 673.—Boyd.

The Steel Company of Canada (Limited), incorporated in England under the Imperial Joint Stock Companies Acts, 1862-1867, and carrying on business in Nova Scotia, and having its principal place of business at Londonderry, Nova Scotia, was, by order of a judge, on the application of the respondents and with the consent of the company, ordered to be wound up under 45 Vict. c. 23, (Dom.) The appellants, creditors of the Steel Company, intervened, and objected to the granting of the winding-up order on the ground that 45 Vict. c. 23, was not applicable to the company:—Held, reversing the judgment of the Supreme Court of Nova Scotia (Fournier, J., dissenting), that 45 Vict. c. 23, was not applicable to such company. *The Merchants' Bank of Halifax v. Gillespie*, 10 S. C. R. 312.

J. I., the appellant, gave to one Q. his note for \$6,000, which was endorsed to the bank of P. E. I.; the Union Bank of P. E. I. at the time held a cheque or draft, made by the Bank of P. E. I., for nearly the same amount, and this draft the appellant purchased for something more than \$200 less than its face value; being sued on the note he set off the amount of such cheque or draft, and paid the difference. On the trial he admitted he had purchased it for the purpose of using it as an off-set to the claim on his note, which he had made non-negotiable, and he also admitted that if he could succeed in his set-off and another party could succeed in a similar transaction, the Union Bank would get their claim against the Bank of P. E. I., which had become insolvent, paid in full. The judge on the trial charged that if the draft was endorsed to the defendant to enable him to use it as a set-off, he

could not do so, because he was a contributory within the meaning of the 76th sec. of the Canadian Winding-up Act, and that the Act, which came into force on the 12th May, 1882, was retrospective as regards the endorsements made before it was passed, but within thirty days before the commencement of the proceedings to wind up the affairs of the bank. The jury, under the direction of the judge, found a general verdict for the plaintiff for the amount of the note and interest, which the Supreme Court refused to disturb. On appeal to the Supreme Court of Canada:—Held, reversing the judgment of the court below, that appellant having purchased the draft in question for value and in good faith prior to 26th May 1882, the Canada Winding-up Act, 45 Vict. c. 23, was not applicable, and therefore the appellant was entitled to the benefit of his set-off, and that the Winding-up Act was not retrospective as to this endorsement. *Jays v. Bank of Prince Edward Island*, 11 S. C. R. 265.

By secs. 75 and 76 of 45 Vict. c. 23, it is provided that if a debt due or owing by the company has been transferred within thirty days next before the commencement of the winding-up under that Act, or at any time afterwards, to a contributory who knows, or has probable cause for believing, the company to be unable to meet its engagements or to be in contemplation of insolvency under the Act, for the purpose of enabling such contributory to set up by way of compensation or set-off the claim so transferred, such debt cannot be set up by way of compensation or set-off against the claim upon such contributory:—Held, that the sections in question only apply to actions against a contributory when the debt claimed is due from the person sued in his capacity as contributory. *Id.*

Held, affirming the judgment of the Court below, 10 O. R. 489, that 47 Vict. c. 39, s. 2, is not limited in its application to companies being wound up at the date of 45 Vict. c. 23, it applies also to companies in liquidation, i. e., insolvent though not technically being wound up, against which proceedings are being taken to realize their assets and pay their debts. *Re Union Fire Insurance Company*, 13 A. R. 268.

## 2. Liquidators.

By 41 Vict. c. 58, (Dom.), the three plaintiffs were appointed "joint assignees" of the Canadian Agricultural Insurance Company for the purpose of winding up under 41 Vict. c. 21 (Dom.) Two of the plaintiffs, the third being unable to attend through illness, met on the 2nd of January, 1878, and made the 4th and 5th calls of 10 per cent. each on the stock of the company:—Held, that the assignees must all join in making calls, and that these calls were therefore invalid:—Held, also, that a meeting of the three joint assignees on the 27th of January, after notice of the 4th and 5th calls had been mailed on the 13th of January purporting to confirm the action of the two assignees of the 2nd of January, had not that effect. *Ross et al. v. Machar*, 8 O. R. 417.—Q. B. D.

An undertaking by a provisional liquidator in possession to pay a landlord's claim to be paid preferentially for over due rent after service of notice under sec. 12 of 45 Vict. c. 23, (Dom.) is by secs. 20 and 21 of that Act void, unless the per-

mission of the *Hamilton Tribune*

Held, per Hay, winding-up order of a liquidator, held as containing a reference to the liquidator's power of appointment must be exercised in that order. It is essential to the winding-up of a company, that the liquidator should have a reference to the winding-up of the company, 13 A. R. 130.

C. purchased shares in 1878, but the payment was not furnished to him until 1881. On February 1st, 1881, he entered on the list of directors, but no formal approval of the directors until, however, on November 1st, 1881, he received a call on the shares and defended the reason not explained. This was the first notice furnished to him, but he appeared to the shareholders in 1881. The company was wound up May 13th, 1883, and C. had taken no action as a shareholder in the proceedings; nor did he notify him that he had been actually consigned to the company:—Held, that C. was right in his position. *Case, L. R. 3 Chy. and The Canada Fire Insurance Co. v. Close's Case*.

In the winding-up of a company, the master of the stock book upon the contributions appears, though they were not, had been allowed to sign the contract signed was a share, and that the Act of two modes of acquisition by allotment. *In re The Toronto, 1*

K. signed a statement. We, the undersigned, are the shares of the capital of the company, and

mission of the court is first obtained. *Fuchs v. Hamilton Tribune Co.*, 10 P. R. 409.—Boyd.

Held, per Hagarty, C. J. O.—Although a valid winding-up order must contain the appointment of a liquidator, the order in question could be upheld as containing the appointment of a provisional liquidator merely, but it was wrong in directing a reference to the master to appoint a liquidator, and also in not providing for notice to creditors, &c. Per Burton, and Osler, J.J.A. It is essential to the validity of such an order that the liquidator should be appointed in it: Such power of appointment cannot be delegated, but must be exercised by the judge or officer in making that order. Per Patterson, J. A.—It is not essential to the validity of a winding-up order that the liquidator should be named in it; and a reference to the master for the purpose of appointing one is proper. *Re Union Fire Insurance Company*, 13 A. R. 268. Reversed by the Supreme Court.

### 3. Contributories.

C. purchased shares in a certain company in 1878, but the papers required to make a formal transfer to him in the books of the company were not furnished to the company till December 20th, 1881. On February 11th, 1882, C.'s name was entered on the list of shareholders, but there was no formal approval of the transfer by the board of directors until May 10th, 1883. Before this, however, on November 15th, 1882, C. was notified of a call on the shares for which he was sued, and defended the action, but the action, for some reason not explained, was not proceeded with. This was the first intimation C. received that the papers furnished by him had been acted upon, but he appeared to have made no enquiries from the company subsequently to December 20th, 1881. The company ceased to do business on May 13th, 1883, and the winding-up order was made on October 9th, 1883. It did not appear that C. had taken any steps to repudiate his position as a shareholder before these winding-up proceedings; nor did he shew any prejudice resulting to him from the failure of the company to notify him that the transfer to his name had been actually consummated on the books of the company:—Held, that under the above circumstances C. was rightly placed on the list of contributories in the winding-up proceedings. *Sichell's Case*, L. R. 3 Chy. 119, distinguished. *Re Cole and The Canada Fire and Marine Insurance Company—Close's Case*, 8 O. R. 92.—Boyd.

In the winding-up proceedings of the Q. C. R. Co., the master placed the subscribers to the stock book upon the list of contributories. The contributories appealed upon the ground that although they were subscribers for stock still no stock had been allotted to them by the directors:—Held, that the master was right; that the contract signed was an unqualified taking of shares, and that the Act R. S. O. c. 150 contemplates two modes of acquiring stock, by subscription and by allotment. *In re The Queen City Refining Company of Toronto*, 10 O. R. 264.—Boyd.

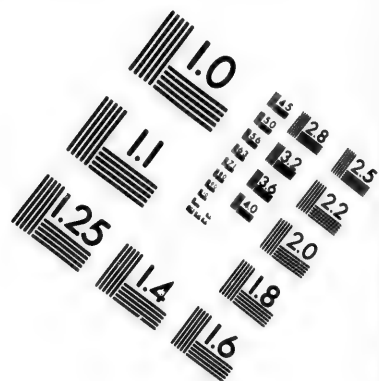
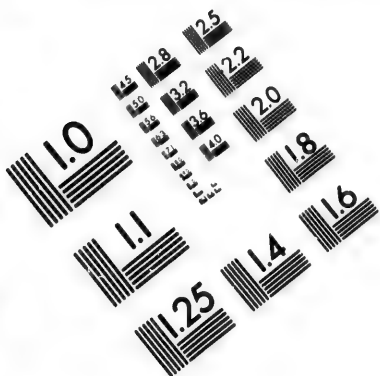
K. signed a stock book headed as follows: "We, the undersigned, do hereby subscribe for shares of the capital stock of the Alliance Insurance Company, and agree to take the number of

shares and for the amount set opposite our respective signatures, and to pay on account thereof to the secretary of the said company 10 per cent. of the amount of stock subscribed by us respectively within thirty days from the day of our several subscriptions." The Act incorporating the Alliance Company vested the shares of the company in the persons who should subscribe for the same. Before any stock was actually allotted to K. the Alliance Company was amalgamated, by 46 Vict. c. 58, (Ont.), with the Standard Insurance Company, which company was ordered to be wound up:—Held, that K. was rightly made a contributory. *Nasmith v. Manning*, 5 S. C. R. 417, distinguished. It was contended that K. never agreed to become a shareholder in the Standard Company; but—Held, that the statute answered this objection, and that being within the jurisdiction of the local legislatures, it could not be objected to as unjust. *Re Standard Fire Insurance Company—Kelly's Case*, 7 O. R. 204.—Ferguson. Reversed on appeal: 12 A. R. 486.

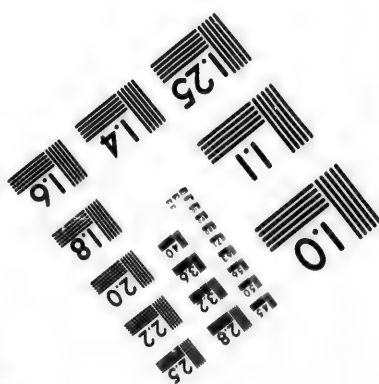
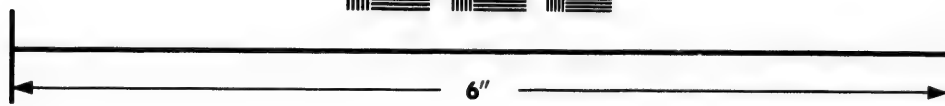
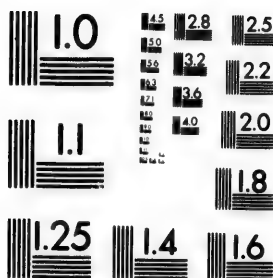
Appeal from master's report, which placed certain parties on the list of stockholders as contributories to the extent of their unpaid stock. C., having been communicated with by the president of the company, agreed to act as a director, and gave his note for \$500, in order to obtain a qualification. The president subscribed for 50 shares stock for him, on which the \$500 would pay ten per cent. C. then acted as a director for some time without (as he alleged) knowing that any stock had been subscribed for him. Subsequently he was notified of a five per cent. call on 50 shares, and he at once communicated with the president, who told him not to mind, and that the secretary would be instructed, and he was not troubled again about it. At this time his note had been carried by the company, and he had paid nothing. The president then absconded, and he was notified of a five per cent. call, and gave a note for \$250 in payment of same, not (as he alleged) because he was liable, but because he was told that would settle his total liability, and he did not wish to enter into a suit:—Held, that he was properly placed on the list of contributories. *S. C.—Chisholm's Case*, 7 O. R. 448.—Ferguson—Proudfoot.

T. signed a power of attorney to C. to subscribe for 20 shares of stock, and delivered it to him on the understanding that it was not to be used except he became a director of the company. C. directed the accountant to enter T.'s name in the stock ledger as a stockholder, which was done. Blotting pads were issued, and an advertisement published in a newspaper, and a return made to the government, with T.'s name inserted as a director in the two former, and as a member in the latter; but no board was ever formed with T. as a director. T. swore that he never saw the pads, advertisement, or returns, and that he did not know his name was in any of them; and on receipt of a notice claiming a five per cent. call, he at once repudiated all liability:—Held, that the stipulation that he was to be a director was a condition precedent to his becoming liable as a shareholder, and that T.'s name must be removed from the list of contributories. *S. C.—Turner's Case*, 7 O. R. 448.—Proudfoot.

B. signed a power of attorney to subscribe for stock under the same circumstances as Turner, but was asked by letter to fix the time to suit



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himself to pay the ten per cent. call, and he added to the power a clause that "the ten per cent. was to be payable in one year from date." He was also notified by the secretary of the company that he was a shareholder, and a notice of a meeting was sent to him. There was no evidence to show that he made the formation of the board a condition precedent to his becoming a shareholder:—Held, that the entry by the accountant of B.'s name as a stockholder was equivalent to an entry by C., to whom the power was given, and was no delegation of any discretionary power, but a mere ministerial act:—Held, also, following *National Insurance Co. v. Egleston*, 29 Chy. 406, that it was not material that the name was not entered in the subscription book, nor that there was no specific allotment of stock; and that B. was properly placed on the list. *S. C. v. Barber's Case*, 7 O. R. 448.—Proudfoot. Reversed on appeal, 12 A. R. 486.

This case was somewhat similar to Barber's case, but there was an understanding that the calls were to be paid in work, and \$100 worth of work was so done and credited in the books of the company; and C., C. & Co. printed the pads, saw the advertisement in the paper, and received notices of the calls:—Held, that they were contributory. *S. C. v. Copp, Clark & Co.'s Case*, 7 O. R. 448.—Proudfoot. Reversed on appeal, 12 A. R. 486.

C. signed a power of attorney on the understanding that he was to be solicitor of the company in Toronto, and that he was to pay no cash on his stock, but to get credit for his services. A certificate that he was a holder of ten shares was sent to him, and was in his possession for some years; and he was appointed solicitor under the seal of the company, received notices of meetings and calls, and did not expressly repudiate his liability:—Held, that he was properly made a contributory. *S. C. v. Caston's Case*, 7 O. R. 448.—Proudfoot. Affirmed on appeal, 12 A. R. 486.

C. subscribed for 160 shares in the H. company, the subscription list being headed: "We subscribe for and agree to take the number of shares of the capital stock of the H. company set opposite our signatures, and to pay on account thereof 50 per cent. to the secretary-treasurer of the company in quarterly payments of 12½ per cent. each of the amount subscribed for by us respectively, the first of such payments to be made on February 1st, 1882." C. was at the first shareholders' meeting elected a director, and remained so until the final winding-up of the company. One of the by-laws of the company provided for the calling up of the second 50 per cent. of the stock subscribed at any time after November 1st, 1882, on thirty days' notice. In August, 1883, the president of the company arranged with C. that he should sign for eighty shares on the terms of a new stock book which had been opened, and that C.'s original stock was to be treated as cancelled. C. accordingly signed the new book. This arrangement with C. was never communicated to the shareholders of the company. In January, 1884, a winding-up order was made, and C. was subsequently declared a contributory to the amount of 160 shares. C. now appealed, claiming to be a contributory only to the amount of 80 shares, on the ground that the arrangement of August, 1883, was a valid compromise, entered into with him because he subscribed originally on

the understanding, (1st) that the company was not to go into operation before all the stock was subscribed for; and (2nd) that only 50 per cent. of his subscription would have to be paid:—Held, that whether directors have inherent power to compromise with shareholders or not, there was nothing to support the compromise here set up. As to (1st,) C.'s actions as director were totally at variance with this contention; and as to (2nd,) the subscription was unconditional, and though expressly providing for payment of 50 per cent. it was not inconsistent with the balance being paid when required. Moreover the by-laws, at the adoption of which C. was present, recognized the right to call up the whole stock, and C. appeared to have made no dissent. *Fache et al. v. The Hamilton Tribune Printing and Publishing Company—Copp's Case*, 10 O. R. 497.—Boyd.

See *Ings v. Prince Edward Island*, 11 S. C. R. 265, p. 120.

#### 4. Practice.

##### (a) Powers of the Court, Judges, and Masters.

The Dominion Insolvent Companies Act, 45 Vict. c. 23, as amended by 47 Vict. c. 39, authorizes the Master in Chambers, the Master-in-Ordinary, or any Local Master or Referee to exercise the powers conferred upon the court in Ontario for the purpose of winding-up insolvent companies. The Master in Chambers, as one of the judicial officers named in the Act, made an order for the winding-up of an insolvent company, and referred it to the Master-in-Ordinary to settle the list of contributories, take all necessary accounts, make all necessary inquiries and reports, and generally to do all necessary acts, matters, and things for the winding-up of the business of the said company:—Held, (1) that the powers vested in the judicial officers named in the Act were conferred upon each of them as persona designata, which they were not authorized to delegate to others or to each other; (2) that the reference was not authorized by the Judicature Act or Rules, or the prior Acts and Rules conferring jurisdiction upon the former judicial officers in Chambers; (3) that the jurisdiction of the Master in Ordinary under the order of reference would be a delegated jurisdiction as the substitute or deputy of the master in chambers, and not the co-ordinate jurisdiction conferred upon his office by the Act; (4) that the order of reference was not therefore warranted by the Dominion or Provincial Acts, and could not be proceeded on. *In re Queen City Refining Company*, 10 P. R. 415.—Hodgins, Master in Ordinary.

It is not competent for the Master in Chambers to make an order under sec. 77 of the Act as amended by 47 Vict. c. 39, s. 5, (Dom.), referring the winding-up to the Master in Ordinary. That may be done by a Judge, as in conformity with the usual course of proceedings in other causes and matters, but it is not the practice, save in one of two exceptional cases, to have references ordered by the Master in Chambers to the Master in Ordinary. The intention of the Act is that the Master in Chambers, or Local Master, or Master-in-Ordinary may grant a winding-up order, and conduct all the proceedings necessary therefor in his own office and before himself as a judicial officer.

er. *Re Joseph T. P. R. 485.*—Boyd.

The court will assets to be inter affecting the est bringing their right office, which the at law. *Clarke v. Caston's Case*, 10 A. R. 486.

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An order was r Chancery Division the winding-up un of a fire insurance legislature of Ont proceedings had previ O., c. 160, and the ing-up Act, (Ont.) receiver in the for ator, &c., and fur to appoint a liquid of contributories; tain accounts and i under the previous porated with and eedings under the as they could pro Held, (1) that this appeal would lie un the Union Fire Insu

The Chancery pr the sales under th ompanies Act; and u before offering prop whether a sale by a tract, would be th estate. When a sa etel, an affidavit property should be may be compared

(c)

*Re Joseph Hall Manufacturing Company*, 10 P. R. 485.—Boyd.

The court will not allow its administration of assets to be interfered with by other proceedings, affecting the estate; and creditors of such estate bring their rights with them into the master's office, which the court substitutes for proceedings at law. *Clarke v. The Union Fire Insurance Co.—Caston's Case*, 10 P. R. 339.—Hodgins, *Master-in-Ordinary*.

In proceeding under a judgment for the winding-up of a company, the master has the same jurisdiction to try claims for unliquidated damages arising out of breach of contract as he would have in an administration proceeding. *Ib.*

In proceeding in a judgment for winding-up a company, the former solicitor of the company brought in a claim for bills of costs alleged to be due him which the master referred to one of the taxing officers to tax:—Held, that the master had authority to direct such reference. *Ib.*

A winding-up order under 45 Vict. c. 23 (Dom.), winding up a foreign company doing business in Ontario, made by one judge, will not be set aside by another. An application for that purpose must be made to the Divisional Court. *In re Lake Superior Native Copper Company (Limited)—Re Plummer*, 9 O. R. 277.—Proudfoot.

When proceeding under 45 Vict. c. 23, s. 24, (Dom.), as amended by 47 Vict. c. 39, s. 4 (Dom.), the court has power to refer the appointment of a liquidator to the master. *Re Clarke v. The Union Fire Insurance Co.*, 10 O. R. 489.—Proudfoot.

#### (b) Appeals.

An order was made by Proudfoot, J., in the Chancery Division of the High Court directing the winding-up under 45 Vict. c. 23 (Dom.), 1882, of a fire insurance company incorporated by the legislature of Ontario, and against which proceedings had previously been taken under R. S. O. c. 160, and the "Joint Stock Companies' Winding-up Act, (Ont.)" This order appointed the receiver in the former proceedings interim liquidator, &c., and further referred it to the master to appoint a liquidator, &c., and to settle the list of contributories; and further provided that certain accounts and inquiries which had been made under the previous proceedings, should be incorporated with and used in the winding-up proceedings under the Dominion statute, in so far as they could properly be made applicable:—Held, (1) that this was an order from which an appeal would lie under sec. 78 of the Act of 1882. *Re Union Fire Insurance Company*, 13 A. R. 268.

#### (c) Other Cases.

The Chancery practice in sale cases applies to the sales under the Dominion Insolvent Companies Act; and under such practice it is usual before offering property for sale to have an inquiry whether a sale by auction, or under private contract, would be the most advantageous to the estate. When a sale by private contract is directed, an affidavit of the actual value of the property should be produced, so that such value may be compared with the price offered. *Re*

*Bolt and Iron Company*, 10 P. R. 437.—Hodgins, *Master-in-Ordinary*.

It is preferable to have the proceedings under an order for winding up a company under 45 Vict. c. 23, (Dom.), conducted by solicitors who are totally unconnected with the company to be wound up. *Re Joseph Hall Manufacturing Company*, 10 P. R. 485.—Boyd.

Under the facts stated in the report of this case, an order having been obtained in chambers by one creditor for winding up a company, the conduct of the proceedings was given to three creditors who had also applied for such order. *Ib.*

In proceedings for a winding-up order under the above statutes, notice need be given only to the company, and perhaps also to creditors who have brought action against the company, which would be stayed by the winding-up order. *Re Clarke v. The Union Fire Insurance Company*, 10 O. R. 489.—Proudfoot.

#### 5. Costs.

Under an order for winding up an insolvent company under 45 Vict. c. 23, (Dom.), the proceedings to enforce the liability of shareholders must be taken by the liquidator, and not by the petitioner for the winding-up order. When proceedings are so taken by the liquidator, and are unsuccessful, costs may be awarded against him personally, leaving him to apply to be allowed such costs out of the assets of the company. *Re Bolt and Iron Company—Hawenden's Case*, 10 P. R. 434.—Hodgins, *Master-in-Ordinary*.

One S., a contributory of the company, petitioning to set aside a winding-up order, was required to give security for the costs of the company and a creditor opposing the petition, where it appeared that S., although he had a nominal interest as the holder of stock upon which nothing was paid, was not in such a position that anything would be made out of him upon execution, and was petitioning merely in the interest of other persons who lived out of the jurisdiction, and who had indemnified him as to costs. *Re Rainey Lake Lumber Company*, 11 P. R. 314.

See also *Clarke v. Union Fire Insurance Company*, 10 P. R. 339.

#### 6. Other Cases.

The winding up of a company under 45 Vict. c. 23, (Dom.), commences from the time of the service of the notice under sec. 12, and therefore, under sec. 69, a landlord's claim to be paid preferentially for overdue rent after such service is invalid. An undertaking by a provisional liquidator in possession to pay such a claim is by sections 20 & 21 void unless the permission of the court is first obtained. *Fitches v. Hamilton Tribune Company*, 10 P. R. 409.—Boyd.

The liquidator of an insolvent company brought in for approval an agreement with certain parties for the sale to them of its assets at a price equal to twenty-five cents on the dollar of the claims of the creditors of the company "as may be admitted or adjudicated," in addition to the costs of the liquidation proceedings to be taxed by the taxing officer, and the remuneration of the liquidator to

be settled by the Master. There was no mode of admitting or adjudicating on such claims provided in the agreement. The agreement was opposed by certain creditors, and thereupon the proposed purchasers withdrew from it:—Held, 1. That if the creditor's claims were to be admitted by and between the parties the agreement was conditional, and the purchasers by withdrawing before ascertainment left the agreement imperfect. 2. That by not providing a mode of admitting or adjudicating upon the creditors' claims, the agreement was ambiguous, and parol evidence would have to be adduced to explain it. 3. That for these reasons the agreement was incapable of being enforced, and could not be approved:—Quære, whether an agreement to purchase the assets of a company at a certain rate in the dollar of the unascertained claims of the creditors of such company would be valid. *Re Bolt and Iron Company*, 10 P. R. 437.—Hodgins, Master-in-Ordinary.

C. F. S. applied for an order for the winding-up of the B. company under 45 Vict. c. 23, (Dom.), and amending Acts, and as evidence of the insolvency of the company shewed that, being entitled to the beneficial interest in a certain policy on the life of her deceased husband, she had demanded payment thereof from the company, but it had been refused; that the suspension of the company had been announced in the papers, and that the manager of the head office in Canada had stated that he was instructed from the head office in England not to make any payments on behalf of the company. It appeared, however, that the policy provided for payment in three months after proof of the death of the insured had been received by the company, while the above demand for payment was made a fortnight after the death, and no other demand had ever been made:—Held, that the debt was not due when the demand was made, and therefore non-payment was not evidence of insolvency within the meaning of 45 Vict. c. 23, ss. 9, 10, 11, (Dom.), nor would the fact that the company had not paid claims amount to an acknowledgment of insolvency within sec. 9 (d) of that Act, nor otherwise was there sufficient evidence here of the insolvency of the company, and the petition must be dismissed:—Held, also, that as a matter of pleading, if it had been intended to rely upon the acknowledgment of insolvency, it should have been stated in the petition. *In re Briton Medical and General Life Association (Limited)*, 11 O. R. 478.—Proudfoot.

Seemle, that even if a general manager of a company positively agreed that any winding-up proceeding that should be necessary should be taken in Ontario rather than elsewhere, this would not bind the company, for the business of the manager is to manage a going concern. It is no part of his duty nor within his power to arrange about putting an end to it. *Ib.*

See *Re Briton Medical and General Life Association (Limited)*, (2) 12 O. R. 441, p. 128. See also *In re Lake Superior Native Copper Co.*, 9 O. R. 277.

#### VIII. FOREIGN CORPORATIONS.

C. & O. carrying on business in Chicago, in the state of Illinois, for the manufacture of mill machinery, &c., had certain machinery manufac-

tured for them in Stratford, Ont., which was warehoused with M. & T., at Woodstock, Ont. C. & Co. being pressed by plaintiffs, their bankers in Chicago, for collateral security for two of their notes of \$5,000 each, discounted by the plaintiffs, endorsed over to the plaintiffs the warehouse receipts for these goods. At the maturity of the notes, C. & Co., not being in a position to retire them, in pursuance of an arrangement to that effect, the warehouse receipts were cancelled and new ones dated 12th October, 1883, were made out direct to the plaintiffs. On 3rd September, 1883, C. & Co. had made an assignment to a trustee in Chicago for the benefit of creditors. On 22nd November the defendant placed writs of execution in the sheriff's hands against C. & Co., under which these goods were seized. No fraudulent preference or intent was proved:—Held, that the plaintiffs, a foreign corporation, could hold personal property in Ontario: that C. & Co., being residents of the state of Illinois, the transfer must be governed by the law of that state, according to which the transfer was valid and effectual: that, even if dealt with as subject to the law of Ontario, when C. & T. gave the warehouse receipts direct to the bank, they held the goods for the plaintiffs, and there was therefore a transfer of both property and possession in the goods to the plaintiffs, subject to the trustee's rights, if any; and the goods being in the hands of third parties and not of C. & Co., the Bills of Sale Act did not apply; and also that the Act as to banks and banking, and warehouse receipts, did not apply to the plaintiffs, a foreign corporation. *The Commercial National Bank of Chicago v. Corcoran*, 6 O. R. 527—C. P. D.

The locality of the forum of litigation determines whether a corporation is foreign or not. A contract executed in Ontario and delivered by the agent of the contractor to the contractee in New York is governed by the laws of Ontario. *Clarke v. The Union Fire Insurance Co.*, 10 P. R. 313.—Hodgins, Master in Ordinary.

Leave was given to sign final judgment under Rule 80 O. J. Act against a company incorporated in England, having its head office there, and in process of liquidation there, but doing business and having assets and liabilities in Ontario. *Plummer v. Lake Superior Native Copper Company*, 10 P. R. 527.—Rose.

Canadian policy holders petitioned for distribution of the deposit made by this company, a foreign corporation, with the minister of finance under 31 Vict. c. 48 (Dom.), and 34 Vict. c. 9 (Dom.), the company being insolvent:—Held, that they were entitled to the relief asked, notwithstanding that proceedings to wind up the company were pending before the English courts. *Re Briton Medical and General Life Association (Limited)* (2), 12 O. R. 441.—Proudfoot.

In an action under 40 Vict. c. 43, s. 47, (Dom.), brought in Ontario against a shareholder, there resident, of a company whose head office was in another province, where judgment had been obtained by the plaintiff against the company and execution thereon had been returned unsatisfied:—Held, reversing the judgment of Rose, J., 7 O. R. 435, that the cause of action against the shareholder was complete without the return unsatisfied of an execution against the company in Ontario. *Brice v. Munro et al.*, 12 A. R. 453.

Assessment of  
of London et al.  
Kingston, 7 O.

See *The Mercantile*  
pie, 10 S. C. R.  
v. *Standard Life*  
re *Lake Superior*  
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See *The Merchants Bank of Halifax v. Gillespie*, 10 S. C. R. 312, p. 119. See also *Pritchard v. Standard Life Assurance Co.*, 7 O. R. 188; *In re Lake Superior Native Copper Company (Limited) Re Plummer*, 9 O. R. 277.

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## XV. LIEN OF SOLICITOR FOR COSTS—See SOLICITOR.

### I. GENERALLY.

In selecting the form of action regard must be had not only to the interests of the plaintiff, but also to those of the defendant, and when a simple inexpensive mode of procedure is open, and a more expensive and burdensome course is adopted, it must be at the peril of costs. *Vandewater v. Horton*, 9 O. R. 548.—Rose.

Priority of payment of costs in distribution of proceeds of sale of goods attached under Absconding Debtor's Act. See *Darling et al. v. Smith*, 10 P. R. 360.

W. sold land to H., and covenanted to indemnify him against a mortgage thereon:—Held, that H. was not entitled to solicitor and client, but only to party and party, costs of an action on the covenant. *Hutton v. Wanzer*, 11 P. R. 302.—Proudfoot.

Right of surety on assignment of a judgment against the principal debtor to the costs. See

*Harper v. Culbert et al.*, 5 O. R. 152; *Victorian Mutual v. Freel*, 10 P. R. 45.

See also *Kaiser v. Boynton*, 7 O. R. 143.

## II. SECURITY FOR COSTS.

### 1. When Ordered.

#### (a) Residents Abroad.

An affidavit filed by the defendant set out that "the said plaintiff has been for some time past, and is now residing, as I am informed and believe, out of the Province of Ontario, and beyond the jurisdiction of this court, having taken up his residence in New York, one of the U. S. A.;"—Semble, that a statement of the plaintiff's residence out of the jurisdiction, on information and belief is not sufficient:—Held, that the foreign residence of the plaintiff was here positively sworn to, and the affidavit was sufficient in substance for the court to act upon in ordering security for costs. *Hollingsworth v. Hollingsworth*, 10 P. R. 58.—Wilson.

A defendant is not necessarily entitled to security for costs because the plaintiff's residence is out of the jurisdiction. If it be made apparent by evidence, which the court should look at, that the defendant has no defence, security will not be ordered. *Doer v. Roul*, 10 P. R. 162.—Dalton, Master—Galt.

Where a plaintiff leaves the jurisdiction permanently while his action is pending, he will be ordered to give security for costs past as well as future. *Hatch v. The Merchants Despatch Transportation Company et al.*, 10 P. R. 253.—Winchester, Referee.

Parties residing out of the jurisdiction who came into the master's office in an administration action pursuant to a notice to creditors, and claim to be creditors of an estate administered there, will be required to give security for costs. *Re Rees—Urquhart v. Toronto Trusts Company*, 10 P. R. 425.—Hodgins, Master in Ordinary.

A defendant is entitled to security for costs from a plaintiff whose permanent residence is foreign, if at the time application is made the plaintiff is actually out of the jurisdiction. *Robertson v. Cowan et al.*, 10 P. R. 598.—Dalton, Master.

The plaintiffs having recovered judgment in the action, the defendant appealed to the Court of Appeal, and then moved to compel the plaintiffs to give security for costs, on the ground that they resided out of the jurisdiction, and had since the recovery of judgment ceased to carry on business in this province, and withdrawn their assets therefrom. The motion was refused. *Exchange Bank v. Barnes*, 11 P. R. 11.—Osler.

A defendant asking relief against his co-defendant will not be ordered to give security for costs on the ground of residence out of the jurisdiction:—Semble, such relief should not be asked by way of counter-claim. *Walsley v. Griffith et al.*, 11 P. R. 139.—Dalton, Master.

#### (b) Insolvency of Plaintiff.

See *Clark v. St. Catharines*, 10 P. R. 205, p. 132; *Clarke v. Rama Timber Transport Company*

(Limited), 10 P. R. 384, *infra*; *Re Rainey Lake Lumber Company*, 11 P. R. 314, *infra*.

#### (c) Other Cases.

Security for costs was ordered in an action brought by a ratepayer for himself and the other ratepayers to restrain the delivery by the corporation of certain debentures to a railway company, where it appeared from the examination of the plaintiff that he was financially incompetent to pay the defendants' costs, and was only interested to an insignificant extent; and where he swore that he expected certain persons named to pay his costs and to protect him should the case go adversely, that he did not want to spend any money on the prosecution of his own right in the matter, and that he did not know who instructed the plaintiff's solicitor. *Clark v. St. Catharines*, 10 P. R. 205.—Dalton, Master.

Where several parties suffer damage from the acts of the defendant, and they agree among themselves to share the costs of a test action by one of them to establish his rights, security for costs will not be ordered even though such a plaintiff is insolvent. *Clark v. St. Catharines*, *supra*, distinguished. *Clarke v. Rama Timber Transport Company (Limited)*, 10 P. R. 384.—Dalton, Master—Osler.

One S., a contributory of the company, petitioning to set aside a winding-up order, was required to give security for the costs of the company and a creditor opposing the petition, when it appeared that S., although he had a nominal interest as the holder of stock upon which nothing was paid, was not in such a position that anything could be made out of him upon execution, and was petitioning merely in the interest of other persons who lived out of the jurisdiction, and who had indemnified him as to costs. *Re Rainey Lake Lumber Company*, 11 P. R. 314.—Dalton, Master.

Sec. 10 of the Interpleader Act, R. S. O. c. 54, does not place a sheriff in a more advantageous position than an ordinary suitor, and the fact that a claimant is a married woman and in financial straits, is not a ground for ordering security for the sheriff's costs. *Sweetman v. Morris*, 10 P. R. 446.—Boyd.

Security for costs will not be ordered when the defendant has admitted the cause of action; and it is not essential that the admission should be in the action, on the pleadings, or in any technical form. *Anglo American Casing Company (Limited) v. Rowlin*, 10 P. R. 391.—Boyd.

The plaintiff swore that there was no defence on the merits, and produced a letter received from the defendant before action, promising to pay the claim sued on:—Held, that this uncontradicted or explained warranted the conclusion that there was no defence. *Bank of Nova Scotia v. La Roche*, 9 P. R. 503, not followed. *Ib.*

The defendant admitted on his examination in this cause, that he owed the debt sued for, but he afterwards alleged a counterclaim for illegal arrest by the plaintiff in the course of this action:—Held, that under these circumstances, the defendant was not entitled to security for costs, and a præcipe order for security was set aside, with costs. *Doer v. Roul*, 10 P. R. 162.—Dalton, Master—Galt.

In a penal action, an order of the C. L. P. properly made after being delivered, examined, as a but, Held, that security should be entered in such words of sec. 544.—Rose.

See *Eccham*, p. 131.

See *Hollingsworth*, 58, p. 131.

Held, that a costs is a stay of motion for judgment to set aside security for costs. *P. R. 162.—Dalton*.

The statement of a plaintiff complained of an alternative did not admit brought into court was sufficient, and into court undisturbed there to be succeeded, and ordering security. *P. R. 118.—Boyd*.

See *Walsley*, p. 131.

The defendant order for security the plaintiff to pay a bond for further payment the latter sum. local judge was be sufficient:—power to fix the a præcipe order been taken out. Rose.

An order amounting for costs, issued by reducing the sum, court, was reversed for making the rule. O. J. Act, does not the sum named in. *McKay*, 11 P.

4. *Clark*

The plaintiff, who obtained a judgment

## 2. Practice.

### (a) Time for Applying.

In a penal action brought by a common informer, an order for security for costs, under sec. 71 of the C. L. P. Act, was held to have been properly made after the statement of defence had been delivered, and after the parties had been examined, as authorized by Rule 429, O. J. Act, but, Held, that the order should direct that security should be given "for the costs to be incurred in such suit or action," following the words of sec. 71. *Budworth v. Bell*, 10 P. R. 344.—Rose.

See *Exchange Bank v. Barnes*, 11 P. R. 11, p. 131.

### (b) Affidavits.

See *Hollingsworth v. Hollingsworth*, 10 P. R. 58, p. 131.

### (c) Other Cases.

Held, that a precept order for security for costs is a stay of proceedings while it exists, and motion for judgment made simultaneously with the motion to set aside the precept order for security for costs was refused. *Doe v. Raul*, 10 P. R. 162.—Dalton, Master.—Galt.

The statement of defence set up that the assault complained of was in self-defence, and, as an alternative defence, that, while the defendant did not admit his liability for damages, he brought into court \$150, and said that the same was sufficient, &c.:—Held, that the money paid into court under this defence could not be retained there to answer the defendant's costs, if he succeeded, unless a proper case was made for ordering security for costs. *Rogers v. Loos*, 11 P. R. 118.—Boyd.

See *Walmley v. Griffith et al.*, 11 P. R. 139, p. 131.

## 3. Amount of.

The defendant having obtained on precept an order for security for costs, a local judge allowed the plaintiff to pay \$200 into court in lieu of giving a bond for \$400, and afterwards ordered a further payment of \$50, but refused to increase the latter sum. An appeal from the order of the local judge was dismissed, as \$250 appeared to be sufficient:—Quere, whether there is any power to fix the amount at less than \$400, where a precept order under rule 431, O. J. Act has been taken out. *North v. Fisher*, 10 P. R. 582.—Rose.

An order amending a precept order for security for costs, issued under rule 431, O. J. Act, by reducing the security to \$200, cash paid into court, was reversed, where no reason was shown for making the reduction:—Held, that rule 425, O. J. Act, does not authorize the reduction of the sum named in rule 431, O. J. Act. *Rutledge v. McKay*, 11 P. R. 439.—Fergusson.

## 4. Cancellation of Bond.

The plaintiff, who lived out of the jurisdiction, obtained a judgment at the trial which was

affirmed by the Divisional Court, except as to one defendant against whom the action was dismissed, without costs:—Held, pending an appeal to the Court of Appeal by the other defendants, that the plaintiff was entitled to have his bond for security for costs taken off the files and delivered up to be cancelled. *Hately v. The Merchants Despatch Transportation Company et al.*, 11 P. R. 9—Q. B. D.

## III. APPLICATION FOR FULL COSTS.

An action for the price of two distinct parcels of goods sold and delivered. The defendants accepted a bill of exchange for each parcel, one bill being for \$103.80, and the other for \$106.40. At the time the action was brought the second bill had not matured, as was alleged by the defendants, and afterwards admitted by the plaintiffs. Upon the application of the plaintiffs the master made an order, under Rule 322 O. J. Act, for final judgment against the defendants for the first parcel of goods sold and delivered, that is, for \$103.80, with interest and costs of suit, including the costs of the application, "to be taxed according to the course and practice of the court." Under this order the taxing officer allowed the plaintiffs County Court costs on that part of their claim upon which they obtained the order for judgment, and he allowed to the defendants the full costs of the High Court of Justice on that part of the plaintiffs' claim upon which the defendants succeeded, that is, upon the claim for \$106.40, the price of the second parcel of goods. Upon an application by the defendants to revise the taxation:—Held, that it was the duty of the taxing officer to look at the pleadings, and if necessary receive affidavits so as to ascertain the facts of the case: that Division Court costs only should have been taxed to the plaintiffs, as the amount for which they obtained judgment was ascertained by the signature of the defendants, and was therefore within the competence of the Division Court: that the defendants should have Superior Court costs down to and including the statement of defence, which would not have been required but for the plaintiffs claiming improperly the price of the second parcel of goods, which was not due, and also their costs of this application, with a set-off pro tanto against the plaintiffs' judgment and costs. *White Sewing Machine Company v. Belfry et al.*, 10 P. R. 64.—Wilson.

After a mortgage sale the first mortgagee paid the surplus proceeds of sale (\$162) into court. The third mortgagee petitioned for payment out to him of the \$162, alleging that the second mortgage was void for want of consideration, &c. A reference was directed, and the master found that the second mortgage was valid, and that a much larger amount than \$162 was due upon it. The claimants of the fund lived in three different counties. An order made upon further directions gave the second mortgagee the costs of the petition and reference:—Held, that what was in contest was the whole amount represented by the second mortgage, and the subject matter thus involved exceeded the limits of the former equitable jurisdiction of the County Court, and therefore, and also because the different respondents resided in different counties and the money in question was in court in a third county, the tax-



ing officer was right in taxing costs upon the higher scale. *Re Lyons*, 10 P. R. 150.—Boyd.

In an action in the Common Pleas Division, for trespass to lands and removal of fixtures, the plaintiff recovered a verdict for \$50. The taxing officer taxed Division Court costs to the plaintiff, and full costs to the defendant. The pleadings admitted an entry under an agreement as to placing fixtures, and their removal and appropriation, but put in issue their wrongful removal.—Held, that the taxing officer was right, the title to corporeal hereditaments not being in question.—Held, also, that though the defendant had failed to prove his defence, he was entitled to set off his costs. *Richardson v. Jenkin*, 10 P. R. 292.—C. P. D.

An action in the Common Pleas Division for \$288.20, the balance of a claim of \$1,828.20 for 8,310 lbs. of butter at 22c. per lb. \$1,600 had been paid on account of the claim. The plaintiff obtained a verdict for \$288.20. No certificate for costs was asked for at the trial.—Held, on a motion to a judge for an order directing the defendant to pay to the plaintiff full costs without deduction or set-off, that the amount was liquidated by the act of the parties, within the meaning of R. S. O. c. 43, s. 19, sub-s. 2, and the plaintiff, without a judge's certificate, was entitled to County Court costs only. *Durnin v. McLean*, 10 P. R. 295.—Rose.

Mortgagees after the exercise of power of sale in their mortgage claimed that \$182.61 was still due to them, but on an account being taken \$20.07 was found due to the mortgagor.—Held, that laying aside the question of the whole amount of the mortgage money (\$6,705) the amount involved was \$202.68 and therefore the case was not within Rule 515 O. J. Act (C. S. U. C. c. 15 s. 34, sub-s. 8), and the costs were properly taxed on the higher scale. *Morton v. Hamilton Provident and Loan Society*, 10 P. R. 636.—Proudfoot. Affirmed by Chy. D., 11 P. R. 82.

An order in Chambers referred an action in the High Court of Justice to a master to assess the damages, and directed that the costs should be taxed to which ever party was successful in a certain appeal. There was no trial, and no judgment was entered. The master assessed the damages at \$60, and the taxing officer taxed to the plaintiff, who succeeded in the appeal, his costs upon the High Court scale.—Held, that the officer had no power under the order to determine the scale of costs, and he was therefore right in taxing upon the scale of the court in which the action was brought. *McGarvey v. The Corporation of the Town of Strathroy*, 11 P. R. 57.—Rose.

At the trial the learned judge only allowed County Court costs. On shewing cause to the defendants' motion, the plaintiff, who had not moved, asked to have the direction as to costs varied, and full costs allowed; but the court, in the absence of a substantive motion therefor, refused to interfere. *Dymond v. The Northern and North Western R. W. Co.*, 11 O. R. 343.—C. P. D.

In an action against justices of the peace for false imprisonment, &c., the Divisional Court (10 O. R. 631) ordered judgment to be entered for the plaintiff for \$25, the damages assessed by the jury, leaving the costs to be taxed according

to such scale and with such rights as to set-off as the statute and rules of court might direct. Upon appeal from taxation.—Held, that the action being within the proper competence of the Division Court, (unless the defendant objected thereto) the plaintiff should have costs only on the scale applicable to that court, and the defendants should have their proper costs by way of deduction or set-off.—Held, also, (Cameron, C. J., dubitante) that the effect of R. S. O. c. 73, s. 19, read in connection with sec. 12 of that Act and with R. S. O. c. 43, s. 18, sub-s. 5, R. S. O. c. 47, s. 53, sub-s. 7, and R. S. O. c. 50, s. 347, is not to provide that the plaintiff should have costs on the Superior Court scale when his recovery is within the jurisdiction of an inferior court. Per Cameron, C. J.—The case came under sec. 18 rather than sec. 19 of R. S. O. c. 73.—*Ireland v. Pitcher et al.*, 11 P. R. 403.—C. P. D.

The defendants under a mortgage for \$2,500, made by plaintiff's father and containing a distress clause, distrained the plaintiff's goods for interest amounting to \$112.55. The plaintiff claimed that the distress was illegal and should be set aside, that the defendants should be enjoined from selling the goods distrained, and that the plaintiff should be paid \$200 damages, or if the distress should be held legal, that the plaintiff should be subrogated to the right of the defendants under their mortgage, as against the mortgagor. The judge at the trial found in favour of the plaintiff, assessing the damages at \$25, and granting the injunction prayed for; but this judgment was reversed by the Divisional Court and judgment for defendants was ordered to be entered, with costs.—Held, that the action was not one that could properly have been brought under the equity jurisdiction of the County Court before the passing of the O. J. Act and Law Reform Act, 1868, though the arrears of interest and the damages found by the learned judge were less than \$200; and therefore the case did not come under Rule 515, O. J. Act, and the costs should be taxed on the scale of the High Court. *McDonell v. The Building and Loan Association*, 11 P. R. 413.—Cameron.

Where in an action of libel a verdict for \$1 damages was found, and the judge at the trial gave no certificate for costs.—Held, that the plaintiff was entitled to tax full costs. *Garnett v. Bradley*, 3 App. Cas. 944, considered and followed. *Wilson v. Roberts*, 11 P. R. 412.—Q. B. D.

Where the plaintiff's claim in an action to enforce a mechanic's lien was only \$142, but at the time the action was begun the aggregate amount of the liens (the plaintiff's and another) registered against the property was over \$200.—Held, that the action was properly brought in the High Court of Justice, and the costs should be on the scale of that court, and it made no difference that the other lien holder failed to substantiate his claim. *Hall v. Pilz et al.*, 11 P. R. 449.—Wilson.

The plaintiffs had judgment and execution against one of the defendants for less than \$200, and sought in this action, though not on behalf of all creditors, to set aside a conveyance by that defendant to the other, as fraudulent. At the trial this action was dismissed. At the time it was brought the sheriff had other executions in

his hands against more than one defendant. It had been successfully impeached on Creditors' Relief case, and the matter involved was taxable on *Bank v. Hoffer*.

It is proper to judge as to the costs taxed. *Id.*

#### IV. WHERE PAID.

An action on there was a County Court, was reversed there was a sum of his claim, and counterclaim, for \$15.69, and he to full costs. pleaded respect claim, and the in consequence statute the balance of the plaintiff's favour.—Held, that the defendant were entitled to the costs of the action, and the costs thereof respectively subsequent proceedings also entitled to taxing officer to judgment entered the balance should be paid. *Hingsworth*, 5 O. R. 141.

See *Gough v.*

#### V. COSTS.

The costs of a jury disagreeing had been made taxable against the plaintiff who ultimately succeeded.

See *Christopherson*, 141.

#### VI. COSTS REPAID.

##### 1. Unnecessary.

Costs of cross-examination unnecessary. *W. Co.*, 9 A. R. 141.

Costs where the same consideration was given to one motion. See *Wansley v.*

140. See also *Snider v. S.* 747; *Snider v. S.* 140.

Held, in this case the plaintiff succeeded in



his hands against the same defendant, amounting to more than \$200:—Held, that if the plaintiffs had been successful all the executions must have been satisfied out of the property covered by the impeached conveyance, and the provisions of the Creditors' Relief Act would have applied to the case, and therefore the amount of the subject matter involved exceeded \$200, and the costs were taxable on the High Court scale. *Dominion Bank v. Heffernan et al.*, 11 P. R. 504.—Ferguson.

It is proper practice to obtain a direction of a judge as to the scale of costs before they are taxed. *Ib.*

#### IV. WHERE PARTY HAS SUCCEEDED ONLY IN PART.

An action on an unsettled account, to which there was a counterclaim also on an unsettled account, was referred. The referee found that there was a sum of \$148.81 due the plaintiff on his claim, and \$164.50 due the defendant on his counterclaim, leaving a balance due defendant of \$15.69, and he certified to entitle the defendant to full costs. The Statute of Limitations was pleaded respectively to the claim and counterclaim, and the items barred by the statute were in consequence disallowed; but apart from the statute the balance would have been in the plaintiff's favour:—Held, that the plaintiff and defendant were entitled to recover the costs of and relating to the claim and counterclaim, and proof thereof respectively, including the reference and subsequent proceedings; the defendant being also entitled to recover the sum of \$15.69. The taxing officer to divide items in common; and judgment entered for the party in whose favour the balance should be found. *Coughlin v. Hollingsworth*, 5 O. R. 207.—Rose.

See *Gough v. Bench*, 6 O. R. 699, p. 11.

#### V. COSTS OF ABORTIVE TRIAL.

The costs of a trial which was abortive because the jury disagreed, no order to the contrary having been made by the judge at the trial, were held taxable against the defendants by the plaintiff who ultimately succeeded. *Copeland v. The Corporation of Blenheim*, 11 P. R. 34.—Rose.

See *Christopher v. Noxon*, 10 P. R. 149, p. 141.

#### VI. COSTS REFUSED BY COURT OR JUDGE.

##### 1. Unnecessary or Vexatious Proceedings.

Costs of cross actions refused where actions unnecessary. *Norvell v. Canada Southern R. W. Co.*, 9 A. R. 325.

Costs where several motions depend really upon the same considerations, and should have been only one motion. See *Monteith v. Walsh*, 10 P. R. 162.

See *Wansley v. Smallwood*, 11 A. R. 439, p. 140. See also *Beatty v. O'Connor*, 5 O. R. 731, 747; *Snider v. Snider*—*Snider v. Orr*, 11 P. R. 140.

##### 2. Other Cases.

Held, in this case, that inasmuch as the plaintiff succeeded in the only branch of the case

argued before the Divisional Court, she could get her costs of that appeal, but as to the rest of the suit, to save the expense and trouble of apportionment, no costs should be given or received. *Gough v. Bench*, 6 O. R. 699—Chy. D.

In this case the motion to quash the by-law was refused, but without costs, as the applicant had been led into his position by the indiscretion of certain members of the corporation. *In re Workman and the Corporation of the Town of Lindsay*, 7 O. R. 425.—Rose.

In this case the defendant was refused his costs, as the ground on which he had succeeded did not go to the merits. *Regina v. Sparham*, 8 O. R. 570.—Rose.

The practice of bringing an action for an amount due on a mortgage within the proper competence of the Division Court in the High Court by making a claim for possession of the land, is one that must be carefully guarded; and, except in cases clearly indicating the necessity for proceeding in the High Court, no costs will be given to the plaintiff. In this case where the amount claimed under a mortgage was within the proper competence of the Division Court, but the suit was brought in the High Court, and there were no circumstances showing the necessity for bringing it therein, no costs were allowed the plaintiff. *Vandewater v. Horton*, 9 O. R. 548.—Rose.

A bank claimed the right to charge against an account in priority to the claims of the plaintiff and S. cheques or notes of J. presented or maturing after notice to the bank of J.'s death:—Held, that they could not do so, and in consequence of having made such claim both in this court and the court below, they were refused their costs. *Bailey v. Jellett*, 9 A. R. 187.

An order was made dismissing an action for penalties under the Dominion Election Act, 37 Vict. c. 9, for wilful delay in prosecution, without costs, for the reason that a prima facie case of bribery was established against the defendant, which he had not attempted to contradict. *Miles v. Roe*, 10 P. R. 218.—Boyd.

On a motion for a writ of prohibition to restrain an action in a Division Court:—Held, that as the learned judge who tried the case does not allow County Court costs in similar cases, and as the plaintiff was obliged to sue in the Division Court at the risk of prohibition, or in the County Court, and lose his costs, that the defendants should get no costs of this motion, unless he successfully resist the suit to be subsequently brought to recover the amount of the note. *Re Young v. Mordeu*, 10 P. R. 276.—Rose.

In this case the action was dismissed without costs as the point decided was a new one, and the statute was not plainly expressed. *Wallace et al. v. The Board of Public School Trustees for Union School Section No. 9 of the Township of Lobo, in the County of Middlesex et al.*, 11 O. R. 648.

A conviction was quashed without costs where it appeared that the defendant had attempted to tamper with the informant. *Regina v. Ryan*, 10 O. R. 254.—Rose.

Official guardian's costs. See *Westgate v. Westgate et al.*, 11 P. R. 62.

## VII. APPEAL AS TO COSTS.

1. *When in Discretion of the Judge.*

Held, that the order of Armour, J., 11 P. R. 419, refusing the third parties their costs, was made in the exercise of a discretion which, by sec. 52 O. J. Act, was not subject to review without leave, and as no such leave had been given, an appeal from the order was dismissed, with costs. The court directed that such part of the costs incurred by the third parties in establishing the defence as might properly have been incurred by the defendants, should be allowed by the taxing officer. *Tomlinson et al. v. The Northern Railway Company of Canada et al.*, 11 P. R. 526—C. P. D.

Per Osler, J., the rule as to an appeal on the question of costs appears to be this, that if, in making the order complained of, there has been any violation of principle or the court has proceeded on a wrong general rule, or if the discretion of the court has been exercised upon any misapprehension of fact, a Court of Appeal will interfere, but not otherwise. *Wansley v. Smallwood*, 11 A. R. 439.

On an application by an insurance company to stay proceedings, in an action on a policy, pending an arbitration as to the amount of loss under the statutory conditions, the court granted a stay on the company admitting its liability on the policy; and further ordered, but without defendant's consent, that either party might, after the award, apply to the court in respect of the costs of the arbitration. On a subsequent application an order was made by a judge in chambers on defendant to pay a part of such costs:—Held, that the court had jurisdiction to deal with the costs; and moreover, that defendants having submitted to the order of the court, and taken the benefit of it, could not object to the order of the judge made under it. *Hughes v. The British America Insurance Company, and Hughes v. The London Assurance Company*, 7 O. R. 465—Q. B. D.

See *Small v. Lyon*, 10 P. R. 223, p. 142; *Petrie v. Guelph Lumber Company et al.*, 10 P. R. 600, p. 142. See also *Wansley v. Mitchell*, 5 O. R. 427; *Re Olmstead v. Errington*, 11 P. R. 366.

## VIII. AFTER ABANDONMENT OR DISCLAIMER.

Where the plaintiffs brought action against the defendants to recover possession of certain lands, and the latter resisted the claim, and also served a third party notice upon H., claiming indemnity; and, thereupon, by order in chambers, on the application of the defendants, H. was made a party defendant to the action, and the plaintiffs afterwards abandoned their claim to the lands:—Held, that the plaintiffs must pay H.'s costs. *Beard et al. v. Credit Valley R. W. Co.*, 9 O. R. 616.—Ferguson.

J., one of the defendants, had bid for and had become purchaser of a lot of land sold under the provisions of R. S. O. c. 216, by certain parties claiming to be trustees of the Coloured Wesleyan Methodist Church, whose proceedings in respect of such attempted sale were impeached in the action to which J. was made a party defendant, although he avowed his willingness to withdraw from the purchase, and by his answer

disclaimed all interest in the result of the suit, and alleged that no effort had been made by him to have the sale carried out, as he was aware that the same would have to be first confirmed by the members of the said church. At the trial judgment was pronounced setting aside the sale, and ordering the defendants generally to pay costs:—Held, varying the judgment of the court below, that under the circumstances a formal disclaimer was not required, and J. was ordered to be paid his costs of the appeal, but the action in the court below was dismissed as against him, without costs. *Wansley v. Smallwood*, 11 A. R. 439.

## IX. SET-OFF OF COSTS.

See *Richardson v. Jenkin*, 10 P. R. 292, p. 135. *Ireland v. Pitcher et al.*, 11 P. R. 403, p. 136. See also *Brown v. Nelson*, 11 P. R. 121.

## XI. TAXATION.

1. *Attenda-ve at Taxation.*

The taxing officer has a discretion as to the attendance of parties claiming a right to attend at taxation, and his discretion will not be lightly interfered with. *Clarke v. The Union Fire Insurance Co.—Caston's Case*, 10 P. R. 339.—Hodgins, *Master in Ordinary*.

2. *Costs Allowed.*(a) *Tariff.*

The tariff of costs now in force does not pretend to exhaust all possible items or services for which remuneration is to be made. The object of a tariff is to provide a fixed or movable scale for usual and ordinary services and as to all items embraced therein it is generally conclusive, but for other matters one has to go outside of the tariff to the practice and course of the court. It is therefore for the taxing officer to determine according to a proper discretion, what allowance to make for procuring the attendance of witnesses who live out of the jurisdiction. Rules 154 and 168 of T. T., 1856, are still in force as to matters not embraced in the tariff of 1881. *Ball et al. v. Crompton Corset Co.*, 11 P. R. 256.—Boyd.

(b) *Costs in the Cause.*

Costs of moving to postpone a trial on account of the absence of a material witness will be costs in the cause where the party moving has made diligent efforts, &c., to secure the attendance. *Brown v. Porter—Knox v. Porter*, 11 P. R. 250.—Rose.

(c) *Counsel Fee.*

Where the defendant's solicitor was served with a short notice of motion, which was admitted to be defective:—Held, that the defendant was not entitled to the costs of counsel attending on the motion merely to show that the notice was irregular. *Waller v. Claris*, 11 P. R. 130.—Wilson.

The Administration of Justice Act, 1885, has not conferred upon local registrars of the High

Court the power to award greater amounts of costs in force. *Price v. The H. R. 30.—Boyd.*

Upon an appeal by a party and fee for settling counter claim under v. *Schood*, 157.—Wilson.

The discretion of the fee at the trial.

A counsel fee per enlargement taxed. *McCall Boyd.*

According to the bar is stipulation, to merit in respect by him, and of remuneration or in violation of member of the was retained by counsel before in Nova Scotia stipulation to he must be deemed the usual terms are rendered, as of right and rem the lex loci cont. Held, further, t Act 1876, s. 19 bar the remedy Kennedy v. Entered upon. 745.

See *Petrie v. 600, p. 142. S. R. 569; Maguire v. Bradley, 1b. R. 143.*

(d) *W*

A taxing officer the expenses of subpoenaed to a proved abortive cause the defence produce. The costs of the negotiator by the witnesses were abortive trial, journaled trial up could not be i Held, that in re subpoenaing the ing officer did cation given hi topher v. Nozo toot.

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Court the power of taxing counsel fees of any greater amount than is allowed by the tariff of costs in force. *The Bank of British North America v. The Western Assurance Company*, 11 P. R. 30.—Boyd.

Upon an appeal from the taxation of the plaintiff's party and party costs:—Held, a counsel fee for settling plaintiff's reply to the defendant's counter claim should have been taxed. *Alexander v. School Trustees of Gloucester*, 11 P. R. 157.—Wilson.

The discretion of the taxing officer as to counsel fee at the trial should not be interfered with. *Ib.*

A counsel fee of \$5 for each necessary and proper enlargement of a court motion should be taxed. *McCallum v. McCallum*, 11 P. R. 179.—Boyd.

According to the law of Quebec, a member of the bar is entitled, in the absence of special stipulation, to sue for and recover on a quantum meruit in respect of professional services rendered by him, and may lawfully contract for any rate of remuneration which is not contra bonos mores, or in violation of the rules of the bar. When a member of the bar of Lower Canada (Quebec) was retained by the government as one of their counsel before the Fisheries Commission Sitting in Nova Scotia:—Held, that in the absence of stipulation to the contrary, express or implied, he must be deemed to have been employed upon the usual terms according to which such services are rendered, and that his status in respect both of right and remedy was not affected either by the *lex loci contractus* or the *lex loci solutionis*:—Held, further, that the Petition of Right, Canada Act 1876, s. 19 sub-s. 3, does not in such case bar the remedy against the Crown by petition. *Kennedy v. Brown*, 13 C. B. N. S. 677, commented upon. *Regina v. Doutre*, 9 App. Cas. 745.

See *Petrie v. Guelph Lumber Company* 10 P. R. 600, p. 142. See also *Ingram v. Ingram*, 10 P. R. 569; *Magurn v. Magurn*, *Ib.* 570; *Bradley v. Bradley*, *Ib.* 571; *Lalonde v. Lalonde*, 11 P. R. 143.

#### (d) Witness fees and Subpenas.

A taxing officer refused to allow the plaintiffs the expenses of seventeen witnesses who were subpoenaed to attend a trial at Hamilton which proved abortive, the trial being postponed because the defendants had not obeyed an order to produce. The defendants were ordered to pay the costs of the hearing at Hamilton rendered nugatory by the postponement. The seventeen witnesses were subpoenaed to be examined at the abortive trial, and were examined at the adjourned trial upon matters which the judge held could not be interfered with by the court:—Held, that in refusing the plaintiff's the costs of subpoenaing these seventeen witnesses, the taxing officer did not erroneously exercise the discretion given him by Rule 442, O. J. Act. *Christopher v. Noxon et al.*, 10 P. R. 149.—Proudtot.

The plaintiff not being bound to rely on the admissions of the defendants on their examination for discovery, the costs of procuring the attend-

ance of a witness to prove what was then admitted should have been taxed. *Alexander v. School Trustees of Gloucester*, 11 P. R. 157.—Wilson.

Where there is no daily peremptory list of cases at the Assizes, it is necessary to keep the witnesses in attendance from the first day, and the fees for such attendance should have been taxed. *Ib.*

See *Ball et al. v. Crompton Corset Co.*, 11 P. R. 256, p. 140. See also *Ingram v. Ingram*, 10 P. R. 569; *Magurn v. Magurn*, *Ib.* 570; *Bradley v. Bradley*, *Ib.* 571.

#### (e) Other Cases.

The defendant brought into court with his defence a sum which he pleaded was sufficient to answer the plaintiff's claim, and the judge at the trial finding that it was sufficient, directed judgment to be entered for the defendant, with costs:—Held, that the judge at the trial had a discretion to deal with the question of costs, and having exercised it, the taxing officer had no alternative but to tax to the defendant his full costs incurred, as well before as after the payment into court. *Small v. Lyon*, 10 P. R. 223.—Cameron.

The defendants were the same in all three actions. The actions were brought against the defendants other than the company as wrongdoers. They were sued for an alleged conspiracy to defraud, which it was alleged they carried into effect by defrauding the plaintiffs respectively. The defendant McLean defended, meeting the charge directly. The other defendants did the same, but they further said that they obtained their information from McLean, and that they believed it to be true, and believed that the statement made by them and McLean, which was the foundation of the actions, was true:—Held, that the taxing officer was right in allowing two bills of costs, one to the defendant McLean and one to the other defendants. When the actions were in the Court of Appeal, Burton, J. A., made an order that only one appeal book should be printed for the three cases, and the three cases were argued together:—Held, that the taxing officer was right in allowing separate counsel fees in each case. Quare, whether the appeal should not have been to a judge of the Court of Appeal, instead of to one of the Chancery Division. *Petrie v. Guelph Lumber Company et al.*, *Stewart v. Guelph Lumber Company et al.*, *Ingles v. Guelph Lumber Company et al.*, 10 P. R. 600.—Ferguson.

Upon an appeal from the taxation of the plaintiff's party and party costs:—Held, the costs of a similiter with jury notice were properly disallowed. *Alexander v. School Trustees of Gloucester*, 11 P. R. 157.—Boyd.

Instructions for the examination of the plaintiff, and of the defendants, each \$2.00, should have been taxed. *Ib.*

Attendances to bespeak copies of depositions of parties on their examination for discovery in the action should have been taxed. *Ib.*

A fee for attending to hear judgment on a day fixed, when the judge deferred it till a subsequent day at Toronto should have been taxed. *Ib.*

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A fee for attending to hear judgment at Toronto should have been taxed, although a fee on a previous attendance, when judgment was deferred, had been allowed, and a charge for sending a telegram advising defendants of result of judgment, by direction of judge, should have been allowed. *Ib.*

Where the judge directed reasons for judgment in plaintiff's favor to be put in, the plaintiff's charges for drawing, settling, engrossing, &c., such reasons should have been taxed. *Ib.*

Instructions for common affidavit of disbursements was properly disallowed. *Ib.*

Instructions for brief should be allowed where the brief itself is allowed. *McCallum v. McCallum*, 11 P. R. 179.—Boyd.

### 3. Certificate of Taxation.

Upon the issuing of a certificate of taxation a taxing officer is functus officio, and it is only when the court requires information that he should further certify. *Langtry v. Dumoulin*, 10 P. R. 444.—Boyd.

An appeal from a certificate of taxation will not lie until the certificate has been filed. *Ib.*

Under rules 437 and 448, O. J. Act, a taxing officer may issue a certificate of his ruling on any points in dispute pending the taxation, and upon it an appeal may be had, but his right to issue such certificate ceases when he has issued his final certificate. *Ib.*

See *McCallum v. McCallum*, 11 P. R. 179, p. 144.

### 4. Appeals from Taxation.

#### (a) Time for Appealing.

Appeals from taxation by local officers must be brought on within eight days from the date of the taxing officer's certificate. *Stark v. Fisher*, 11 P. R. 235.—Boyd.

Appeals from the taxation of costs by local registrars are subject to the eight days' limit prescribed as to appeals from orders of masters and local judges, as was held in *Stark v. Fisher*, 11 P. R. 235, but the time for appealing may be enlarged by the Master in Chambers or a judge. *Quay v. Quay*, 11 P. R. 258.—Boyd.

Appeals from taxation should be brought on within a reasonable time, and within eight days, the time limited for appeals under rule 427, O. J. Act, is a reasonable time. *Stark v. Fisher*, 11 P. R. 235, and *Quay v. Quay*, 11 P. R. 258, approved. *Ireland v. Pitcher*, 11 P. R. 403.—C. P. D.

See *Langtry v. Dumoulin* 10 P. R. 444, *supra*; *McCallum v. McCallum*, 11 P. R. 179, p. 144.

#### (b) Other Cases.

Held that an application to a judge in chambers to review a taxation of a sheriff's bill of costs taxed under R. S. O. c. 66, s. 48, was properly made under R. S. O. c. 66, s. 52, as rule 447 applied only to the Toronto taxing officers appointed

under rule 438 O. J. Act. *Grant v. Grant*, 10 P. R. 40.—Wilson.

It is a convenient practice, when any case is made on appeal from taxation as to several items, or on the ground of general exorbitancy, to refer the whole bill to one of the taxing officers at Toronto, as upon a revision. *Quay v. Quay*, 11 P. R. 258.—Boyd.

Where no formal certificate of the result of a taxation by a local registrar of the party and party costs was filed, but the bill itself, with a memorandum at the end signed by the registrar showing the result, was filed in the local office and forwarded to Toronto for the purposes of an appeal, and it was admitted that execution had issued upon such memorandum:—Held, that the appeal should not be barred because no more formal certificate was filed. Two clear days' notice of such an appeal is sufficient: *Exchange Bank v. Newell*, 19 C. L. J. 253, distinguished. *McCallum v. McCallum*, 11 P. R. 179.—Boyd.

### COUNSEL FEE.

See COSTS.

### COUNTER CLAIM.

See PLEADING.

### COUNTY COURT.

#### I. JUDGE.

1. *As Local Judge of the High Court*—See PRACTICE.
2. *Appeal to, from Court of Revision*—See ASSESSMENT AND TAXES.
3. *Mandamus to*—See MANDAMUS.

#### II. JURISDICTION.

1. *Liquidated and Unliquidated Claims*, 144.
2. *Title to Land in Question*, 145.
3. *Replevin*, 145.
4. *Other Cases*, 146.
5. *Application for Full Costs*—See COSTS.

#### III. PRACTICE, 146.

#### IV. APPEAL FROM, 147.

### II. JURISDICTION.

#### 1. Liquidated and Unliquidated Claims.

The plaintiff purchased by sample from the defendant two lots of barley consisting of ten and five ear loads respectively. On receipt of the first lot, the plaintiff, alleging that the bulk did not correspond with the sample, claimed \$200 for inferiority in quality. The defendant disputed any liability, and the plaintiff threatened to dishonor the draft which had been drawn on him for the price. In order to sustain his credit with the bank, the defendant telegraphed the plaintiff to accept, and that he would accept

plaintiff's draft for the price of it, had a deduction of \$100 from the lot of five ear loads, and the same grain pay the defendant a cheque for \$200 claimed in defendant telegraph draft. Will be the plaintiff has the defendant in field, reversing per Burton and \$200 and \$100 of the party therefore within Court, and that Per Hagarty, C. either demand v. case had jurisdiction unliquidated claim has jurisdiction causes of action. as each does gregate does not *Schafer*, 13 A.

The plaintiff piano for \$400, two years, with The piano was d. dence, who att. to retain it, and the stipulated p. sued the defendan. ing the \$400 an. was given to st. terest":—Held, t. by the act of t. having neglected the plaintiff was for goods sold and 13 A. R. 481.

#### 2. Title.

The defendant with one S. acqu. land for the pur. There was no dem. thing in the agree. tenants of S. T. that S. would n. those of others to. The question wh. such an interest impond cattle w. title in the sense tion of the Count. of al., 12 A. R. 2.

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plaintiff's draft for the \$200. The defendant's draft for the price, though the defendant was not aware of it, had then been paid by plaintiff. A deduction of \$100 from the price of the second lot of five car loads was subsequently demanded on the same ground, and the plaintiff refused to pay the defendant's draft for that lot unless he sent a cheque for that amount and instructed the bank to pay the plaintiff's dishonoured draft for \$200 claimed in respect of the first lot. The defendant telegraphed the plaintiff, "Accept my draft. Will be down Wednesday and pay you." The plaintiff having paid the second draft, sued the defendant in the County Court for \$300:—Held, reversing the judgment of the court below, per Burton and Patterson, J.J.A., that the sums of \$200 and \$100 were both liquidated by the act of the parties; that the whole demand was therefore within the jurisdiction of the County Court, and that plaintiff was entitled to recover. Per Hagarty, C. J. O.—Without deciding that either demand was liquidated, the court in this case had jurisdiction. It cannot entertain any unliquidated cause of action over \$200; but it has jurisdiction to try any number of unliquidated causes of action in debt, covenant or contract so long as each does not exceed \$200, and the aggregate does not exceed \$400. *McLaughlin v. Schaefer*, 13 A. R. 253.

The plaintiff agreed to sell the defendant a piano for \$400, to be paid by notes at one and two years, with interest, with a rebate for cash. The piano was delivered at the defendant's residence, who after using it for some time objected to retain it, and refused to give the notes or pay the stipulated price. The plaintiff thereupon sued the defendant in the County Court, claiming the \$400 and interest. At the trial leave was given to strike out the words "with interest":—Held, that the amount was ascertained by the act of the parties, and that defendant having neglected to pay either by notes or cash the plaintiff was entitled to recover in an action for goods sold and delivered. *Greenizen v. Burns*, 13 A. R. 481.

## 2. Title to Land in Question.

The defendants by an agreement under seal with one S. acquired a right of user in certain land for the purpose of pasturing their cattle. There was no demise, or right of distress, or anything in the agreement to make the defendants tenants of S. There was, however, a covenant that S. would not allow his own animals, or those of others to enter upon the land in question. The question whether S. gave the defendants such an interest in the land as entitled them to impound cattle was held not to be a question of title in the sense that it would oust the jurisdiction of the County Court. *Graham v. Spettigue et al.*, 12 A. R. 261.

## 3. Replevin.

In an action of replevin brought in the County Court of Haldimand for a mare taken by the defendants from the plaintiff's close in that county, removed to the county of Brant, and there detained until replevied:—Held, that the taking could not be justified under a warrant issued for the arrest of the plaintiff on a charge of stealing

the mare; and although the original taking was justified under a search warrant issued in Haldimand, to search the plaintiff's premises in Haldimand for the mare, and to bring it before a justice of that county, yet the subsequent removal to the county of Brant and detention there were not, and constituted the defendant a trespasser ab initio, and therefore the County Court of Haldimand had jurisdiction to replevy the goods in Brant. *Hoover v. Craig et al.*, 12 A. R. 72.

## 4. Other Cases.

Quers, whether in a proceeding before him, a County Court judge can of his own motion examine proceedings pending in a division of the High Court; but—Held, that the defendant should have been allowed to produce such proceedings in order to meet technical objections as to the state of the cause not being shown. *Hollingsworth v. Hollingsworth*, 10 P. R. 53.—Wilson.

Where, after judgment in an action in the Common Pleas Division, an issue on a garnishee application was directed to be tried under Rule 373, O. J. Act, by a county judge and jury:—Held, that such judge had no jurisdiction to make an order to produce before trial, and consequently no authority to make any order on a failure to produce. *Cochran v. Morrison*, 10 P. R. 606.—Rose.

County Court judges acting under Rule 422, O. J. Act have no jurisdiction under ss. 47 and 48, to order references in opposed cases. *White v. Beemer*, 10 P. R. 531.—Boyd.

A judge of a County Court, acting under the authority of 43 Vict. c. 26, s. 6, (Ont.), removed an assignee for creditors and substituted another assignee. The first assignee, as alleged, refused to deliver over the keys of the place of business of the insolvent to the second assignee, and the judge made an order for the issue of a writ of attachment against the first assignee for contempt:—Held, that the judge, in acting under the statute, was not exercising the powers of the County Court, but an independent statutory jurisdiction as persona designata, and had therefore no power to direct the issue of a writ of attachment; and prohibition was ordered. *Re Paquette*, 11 P. R. 463.—Wilson.

Held, reversing the judgment of Proudfoot, J., 9 O. R. 274, that the status of C., as a person, or the assignee of a person, who registered a plan, was a question of law and fact combined for the County Judge to determine upon C.'s application to him, under R. S. O. c. 111, s. 84, to amend the plan, and that his decision was not examinable in prohibition. *In re Chisholm and the Corporation of the Town of Oakville*, 12 A. R. 225.

## III. PRACTICE.

As to the power of the Master in Chambers to change the venue in County Court actions. See *Brigham McKenzie*, 10 P. R. 406.

At the trial the jury answered all the questions left to them in favour of the plaintiff and judgment was entered for him, which the County Court judge subsequently set aside and entered

judgment for the defendants:—Held, that under Rule 490 O. J. Act, the same power is extended to the County Courts as is possessed by the High Court under Rule 321, and that the judge of the County Court was right in giving judgment in favour of the defendants' instead of submitting the question to another jury. See also, on the same point, *Stewart v. Rounds*, 7 A. R. 575, and *Williams v. Crow*, 10 A. R. 301. *McConnell v. Wilkins*, 13 A. R. 438.

See *Ferguson v. McMartin*, 11 A. R. 731, *infra*.

#### IV. APPEAL FROM.

The judge, at the trial in the County Court, entered a verdict for the plaintiff, instead of directing judgment to be entered, and afterwards refused a rule nisi to set aside such verdict. Rule 405 of the O. J. Act in effect forbids the granting of any rule to shew cause where the application is against the judgment of a judge who tries a cause without a jury. Quare, as to the application of this rule to County Courts by rule 490; but—Held, (per Patterson, J. A.), that the entry of the verdict might be treated as a direction to enter judgment, and was a decision from which an appeal would lie under Rule 510. *Williams v. Crow*, 10 A. R. 301.

An objection to an appeal from a judge refusing such rule might be raised by motion in chambers, but it was not obligatory to raise it in that manner. *Ib.*

An action in the County Court of Carleton was tried without a jury by the junior judge of that county, who, after consideration, entered a verdict for the defendant. A court composed of the senior and junior judges of Carleton, and the judge of the County Court of Prescott and Russell, subsequently assumed to set aside the verdict, and to enter judgment for the plaintiff, dissenting the junior judge of Carleton:—Held, that the judgment of a court so constituted was invalid, and that the verdict at the trial was not affected thereby. Per Patterson, J. A., the verdict at the trial was a final judgment of the court, and could not be attacked except by an appeal to this court. Rule 510, O. J. Act, gives a party no right to move in the County Court. Per Osler, J. A., the party dissatisfied with the judgment at the trial may, under Rule 510, O. J. Act, move against it before the judge himself; and an appeal to this court may, under 45 Vict. c. 6, s. 4, as properly be brought from the decision on such motion as from the judgment at the trial. *Ferguson v. McMartin*, 11 A. R. 731.

An interpleader issue arising out of an action in the Chancery Division of the High Court of Justice was sent to a County Court for trial by order made in chambers:—Held, that it was to be intended that the order was made under 44 Vict. c. 7, (Ont.), rather than under the interpleader jurisdiction of the old Court of Chancery; and that being so, that a Divisional Court of the High Court of Justice had no jurisdiction to hear an appeal from the judgment of the County Court on such issue, and that such appeal should have been to the Court of Appeal, under R. S. O. c. 54, s. 23. *Close v. Exchange Bank*, 11 P. R. 186—Chy. D.

Senble, that an appeal lies from the order of the Judge of the County Court, under the Regis-

try Act, altering or amending a plan. *In re Waddie v. The Corporation of the Village of Burlington*, 13 A. R. 104.

See *McKindsey v. Armstrong*, 11 P. R. 200, p. 26. See also *McKenzie et al. v. Dancey*, 12 A. R. 317.

#### COURT OF APPEAL.

I. WHEN APPEAL LIES, 148.

II. TIME FOR APPEALING AND NOTICE, 149.

III. BOND AND SECURITY, 150.

IV. PRACTICE.

1. *Appeal Books*, 152.

2. *Other Cases*, 152.

3. *Conflict of Cases*—See COURTS.

V. COSTS, 152.

VI. APPEALS FROM COUNTY COURTS—See COUNTY COURT.

VII. MISCELLANEOUS CASES RELATING TO APPEAL GENERALLY—See APPEAL.

#### I. WHEN APPEAL LIES.

Upon an application by the Churchwardens of St. James's Church for leave to appeal from the judgment of the Chancery Divisional Court (O. R. 644) in their own names, or in the name of the rector, the defendant (who declined to carry the case further) as their trustee:—Held, that the rector was not a trustee for the applicants, but would himself, if the contention should prevail, be beneficially entitled to the fruits of the litigation; and that the applicants had not such an interest as entitled them to be made parties to the action; and the application was therefore refused. The event rendered it unnecessary to consider whether or not the application was properly made to this court. *Lengtry v. Damoulin*, 11 A. R. 544.

The plaintiffs by their agent, Patrick R., in April, 1877, procured a judgment to be signed against Peter R., the defendant, who, for purposes of his own, suffered the judgment to go by default. No execution was ever issued thereon. After the death of Peter, the plaintiffs assigned the judgment to the wife of Patrick, who paid them \$50 therefor; and, on her application, Armour, J., made an order allowing execution to issue against the executors of Peter. The executors then applied to set aside the judgment as having been fraudulently obtained, and to be allowed to defend the action, or for such other order as should seem just; and upon such application, Wilson, C.J., made an order setting aside the judgment and all proceedings in the action, and directing the plaintiffs to repay the \$50. This order was affirmed on appeal by the Common Pleas Division:—Held, that an appeal lay from the order of the Common Pleas Division, as it was in effect a final disposition of the whole matter and a bar to the plaintiffs' further proceeding; but, although the members of this court were all of opinion for different reasons that the order below was wrong, they did not agree as to the extent to which it should be modified or reversed, and therefore the appeal was dis-

missed, without 11 A. R. 673.

A motion to the judgment upon the trial ground that the not appealable missed without being divided in and Osler, J. A. an interlocutory 35 O. J. Act, a have been no re J. Act by a dir 35 precludes su though there is heard by a Divi from the order. interlocutory th an appeal lay in Per Burton and sa final adjudic and is only inte step in the inter whole are inte riginal action. Judicature Act pleader issue ne character. The decision of a ju sec. 37 and is no 35. Per Curian right of appeal f it is in terms lin cannot be exten issues. Quare the term "inter nsel in the same (Ont.), as denot and not the stag Andrew v. Bark Whiting v. Hove 16, s. 39 (Ont.

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#### II. TIME FOR

A plaintiff was 3rd of July of the the 30th of June. again until the 20 first time, learned notice of appeal to the rendering of t Act):—Held, not leave to appeal, a



missed, without costs. *Schroeder et al. v. Rooney*, 11 A. R. 673.

A motion to quash an appeal to this court from the judgment of Ferguson, J., (9 O. R. 314), upon the trial of an interpleader issue, upon the ground that the decision was interlocutory, and not appealable under s. 35 O. J. Act, was dismissed without costs, the members of the court being divided in opinion. Per Hagarty, C. J. O., and Osler, J. A.—The decision in question was an interlocutory order within the meaning of s. 35 O. J. Act, and one from which there would have been no relief before the passing of the O. J. Act by a direct appeal to this court; and sec. 35 precludes such an appeal under the O. J. Act, though there is the right to have the order reheard by a Divisional Court, and an appeal lies from the order on rehearing, which is not less interlocutory than the order at the trial, because an appeal lay in such case before the O. J. Act. Per Burton and Patterson, J.J.A.—The decision is a final adjudication on the question of property, and is only interlocutory in the sense of being a step in the interpleader proceedings which, as a whole are interlocutory with relation to the original action. But an appeal lay before the Judicature Act from the decision of an interpleader issue notwithstanding its interlocutory character. Therefore, this decision being the decision of a judge in court is appealable under sec. 37 and is not within the restriction of sec. 35. Per Curiam.—Rule 510 does not give a right of appeal from the decision in question, for it is in terms limited to the trial of actions, and cannot be extended to the trial of interpleader issues. Quare, per Patterson, J. A., whether the term "interlocutory" in section 35 is not used in the same sense as in 45 Vict. c. 6, s. 4, (Ont.), as denoting the character of the decision, and not the stage at which it is pronounced. *McAndrew v. Barker*, 7 Chy. D. 701, discussed. *Whiting v. Horey*, 12 A. R. 119. See 49 Vict. c. 16, s. 39 (Ont.)

The objection that the judge at the trial should himself have decided the issue as to failure of consideration instead of directing an inquiry before the master is not one that the court will entertain. *Featherstone v. Van Allen*, 12 A. R. 133.

Appeal from an order of a judge of the High Court for the winding up of a company under 45 Vict. c. 23, (Dom.) See *Re Union Fire Insurance Company*, 13 A. R. 268.

Appeal for costs. See *Wansley v. Smallwood*, 11 A. R. 439, p. 139.

See *Hately v. The Merchants Despatch Company et al.*, 12 A. R. 640, p. 151. See also *Comme v. Canadian Pacific R. W. Co.*, and the *Canadian Pacific R. W. Co. v. Comme*, 12 A. R. 744; *Regina v. Eli*, 13 A. R. 526.

## II. TIME FOR APPEALING AND NOTICE.

A plaintiff was advised by his solicitor on the 30th of July of the judgment of the court given on the 30th of June. He did not see his solicitor again until the 20th of August, when he, for the first time, learned that he should have caused notice of appeal to be served within a month from the rendering of the judgment. (Sec. 38, O. J. Act).—Held, not a sufficient ground for giving leave to appeal, and thus denying to the party

who had obtained the judgment of the court the right to have it enforced as promptly as the rules and practice of the court will permit.—Held, also, that the fact that the plaintiff might be prejudiced in another action against another party in another division of the High Court of Justice, by this judgment, was not a ground for granting the indulgence sought. *Wilby v. Standard Fire Insurance Company*, 10 P. R. 34, 40.—Cameron.—Q. B. D.

A notice served on Monday, October 6th, of an appeal to the Court of Appeal from a judgment given on the 4th of September, was held too late. *Wright v. Leys*, 10 P. R. 354.—Dalton, Master.

Semble, R. S. O. c. 38, s. 46, would have the effect of preventing an appeal from a judgment more than a year old, unless leave were obtained from the Court of Appeal; but if new evidence were admitted, and the case heard anew, the time for appealing would run from the date of the later judgment.—Semble, also, R. S. O. c. 38, s. 22, was not intended to apply to newly discovered evidence. *Synod v. DeBlaquiere*, 10 P. R. 11, followed. *Bank of British North America v. Western Assurance Company*, 11 P. R. 431.—Proudfoot.

A notice of appeal to the Court of Appeal is not an initiation of the appeal. Where notice was served, but the security required by sec. 38, O. J. Act, was not given.—Held, that there was no appeal pending, and a motion to set aside the notice of appeal, or to dismiss the appeal, was dismissed. *Smith v. Smith et al.*, 11 P. R. 6.—Dalton, Master.—Rose.

Cross applications in respect of the same subject matter were argued together, and both were dismissed by a judgment pronounced on the 26th April, 1885. The question argued was an important one, viz., the ultra vires of an Act. Separate orders were taken out dismissing the two applications, and the time for appealing from both orders was extended till the 6th of June, on which day one of the parties gave notice of appeal from the order adverse to him. The other party, who was not desirous of appealing unless his opponent appealed, was advised too late to serve notice within the time limited, and therefore applied after the expiration of the time to have it extended.—Held, that it was a proper case for exercising a discretion in favour of the applicant, and leave to appeal was accordingly granted. *R. Lake Superior Native Copper Company*, 11 P. R. 36.—Proudfoot.

## III. BOND AND SECURITY.

The condition of an appeal bond in which the defendant was a surety was that the appellant would effectually prosecute his appeal and pay such costs and damages as might be awarded in case the judgment appealed from was affirmed. The appellant discontinued the appeal pursuant to R. S. O. c. 35, s. 41, which enacts that "thereupon the respondent shall be at once entitled to the costs of and occasioned by the proceedings in appeal, and may either sign judgment for such costs or obtain an order for their payment in the court below, and may take all further proceedings in that court as if no appeal had been brought." The registrar, to whom the matter was referred, assessed the damages at the respon-



dent's costs of opposing the appeal:—Held, affirming his finding, that the judgment had been affirmed by the discontinuance, and that these costs had been awarded to the respondent by virtue of section 41:—Quære, as to the meaning of the expression "effectually prosecute." *Hughes et al. v. Boyle et al.*, 5 O. R. 395.—Rose.

An application for further security for costs of appeal, on the ground of the insolvency of one or more of the sureties, should be made to the court appealed from. *Lumsden v. Davis*, 10 P. R. 10.—Burton.

Where one of the sureties in a bond given to secure the costs in the court below became worthless:—Held, that the respondent was entitled to a new one. *Gage v. Canada Publishing Co. et al.*, 10 P. R. 169.—Dalton, *Master*.

An action against the sureties upon a bond given by the defendants in the action of *McLaren v. Canada Central Railway Company*, upon the appeal of the defendants to the Court of Appeal in that case. The defendants in *McLaren v. Canada Central*, appealed from the Court of Appeal to Her Majesty in Council, and in that appeal security had been given and allowed, including security for the whole amount recovered, and execution had been stayed in consequence:—Held, that proceedings must also be stayed in this action. *McLaren v. Stephens*, 10 P. R. 88.—Dalton, *Master*.

A judgment by the Court of Appeal in favour of a defendant appellant puts an end to all liability upon the appeal bond, which may after such judgment be delivered up to the appellant, even where the other party has given notice of appeal to the Supreme Court of Canada. Notice should be given to the opposite party of a motion to take the appeal bond off the files. *Burgess v. Conway*, 11 P. R. 514.—Dalton, *Master*.—Galt.

Held, reversing the order of the Queen's Bench Divisional Court, 11 P. R. 9, that the plaintiff was not entitled to have delivered out to him for cancellation a bond for security for costs of the action, after judgment in his favour by the Queen's Bench Divisional Court, before the time for appealing to this court had elapsed, and while an appeal was actually pending. The order of the court below, even if interlocutory, was appealable under the language of the Court of Appeal Act, and as the penalty of the bond was \$1,000, and the defendants' costs exceeded that amount, the sum in controversy was sufficient to warrant an appeal, and it could not be said that it was a matter so entirely in the discretion of the court below that this court would not interfere. The right of appeal conferred by the Judicature Act considered:—Quære, (per Burton and Patterson, J.J.A.) whether the order in appeal was interlocutory:—Quære, (per Osler, J.A., and Galt, J.) whether secs. 33 and 34 O. J. Act, apply to appeals from interlocutory orders. *Hately v. The Merchants Despatch Company et al.*, 12 A. R. 640.

Payment of money out of court pending appeal. See *Re Donovan, Wilson v. Beatty*, 10 P. R. 71; *Kelly v. Imperial Loan Co. et al.*, 10 P. R. 499; *Canadian Land and Emigration Co. v. Township of Dysart*, Ex. 11 P. R. 51.

See *Smith v. Smith et al.*, 11 P. R. 6, p. 150.

#### IV. PRACTICE.

##### 1. Appeal Books.

Three actions of a similar character were taken to the Court of Appeal, and on the order of a judge only one appeal book was printed for the three cases and the three cases were argued together:—Held, that the taxing officer was right in allowing separate counsel fees in each case. *Petrie v. Guelph Lumber Company et al. and in other cases*, 10 P. R. 600.—Ferguson.

##### 2. Other Cases.

Reviving suit while pending in the Court of Appeal by an order issued from the Division of the High Court appealed from. See *Grasett v. Carter*, 6 O. R. 584.

This court is allowed and required by law to give judgment "according to the very right and justice of the case," and up to the last moment has the right to make any amendment proper for the attainment of that end. Therefore where the defendants had by their answers admitted the truth of certain paragraphs of the bill which charged that they had severally purchased with notice of the claim of the plaintiff; but subsequently they swore that they did not intend to make such admission; that in fact they had not had such notice, and the admission was made in ignorance of its effect; the defendants up to the last stage of the proceedings should be at liberty to set up the facts as a means of defence. *Petrie v. McFarlane*, 9 A. R. 429.—Hagarty.

Where the case was disposed of in the court below on an immaterial issue; and as the appellants chose to rest their case upon a point which the judge found against them, the appeal should be dismissed. An objection to the jurisdiction exercised under R. S. O. c. 42, ss. 16, 22, was not entertained, because there was nothing upon the proceedings to shew that the case was not tried before the proper judge. *McKenzie et al. v. Dancy et al.*, 12 A. R. 317.

See *McLaren v. Stephens*, 10 P. R. 88, p. 151. See also *Grand Junction Railway Co. v. The County of Peterborough*, 13 A. R. 420.

##### V. COSTS.

Costs of an appeal from the Surrogate Court to the Court of Appeal should be taxed on the scale of the court appealed from, as provided by Rule 28 of the Court of Appeal, and not on the scale of County Court appeals. *Regan v. Waters*, 10 P. R. 364.—Osler.

From certificate of taxation. See *Langtry v. Dumoulin*, 10 P. R. 444.

As to appeals from taxation of costs in Court of Appeal. See *Petrie v. Guelph Lumber Co. et al.*, 10 P. R. 600.—Ferguson.

The plaintiffs had succeeded in respect of the title made under the judgment in partition, and not for the estate of the grantor in the memorial, and the effect of that judgment seemed not to have been pressed in the court below, and was not urged before this court until the second argument. Under the circumstances the appeal was dismissed without costs. *Van Velsor et al. v. Hughson*, 9 A. R. 390.

Where an appeal in the court of appeal on that ground. *Garrett*.

See *Wansley v.*

COURT OF APPEAL.  
MINER,

Held, Wilson, and Assize of Oyer and Deliver is Act the High Court of Appeal, 7 O. R.

There is nothing in the Assizes near disposed of for the purpose of his chambers. Supplement Manufacture P. R.—C. P. D.

COURT OF APPEAL.  
See Assize.

I. POWERS OF APPEAL.

1. General.

2. Summary of Court of Appeal.

II. CONFLICT OF JURISDICTION.

III. APPEALS FROM THE COURT OF APPEAL.

IV. JUDGE IN CHARGE.

V. OYER AND ASSIZE.

VI. DIVISIONAL JUSTICE.

VII. NISI PRIUS.

VIII. COURT OF APPEAL AND TAXATION.

IX. OTHER COURT TITLES.

X. OTHER COURT TITLES.

XI. OTHER COURT TITLES.

1. Held, (O'Connor)

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Where an appellant omitted to take an objection in the court below, the court on allowing an appeal on that ground, refused him his costs of appeal. *Garrett v. Roberts*, 10 A. R. 650.

See *Wansley v. Smallwood*, 11 A. R. 439, p. 139.

#### COURT OF ASSIZE OF OYER AND TERMINER, AND GENERAL GAOL DELIVERY.

Held, Wilson, C. J. dissenting, that the Court of Assize of Oyer and Terminer, and General Gaol Delivery is now by virtue of the Judicature Act the High Court of Justice. *Regina v. Bunting et al.*, 7 O. R. 118—Q. B. D.

There is nothing to prevent a judge sitting at the Assizes hearing a chamber motion, if he is disposed for the purpose to treat the court room as his chambers. *The Sarnia Agricultural Implement Manufacturing Company v. Perdue*, 11 P. R.—C. P. D.

#### COURT OF REVISION.

See ASSESSMENT AND TAXES.

#### COURTS.

##### I. POWERS OF.

1. *Generally*, 153.

2. *Summary Jurisdiction*—See CONTEMPT OF COURT—SOLICITOR.

##### II. CONFLICT OF CASES, 154.

##### III. APPEALS FROM—See APPEAL.

##### IV. JUDGE IN CHAMBERS—See PRACTICE.

##### V. OYER AND TERMINER—See COURT OF ASSIZE.

##### VI. DIVISIONAL COURT—See HIGH COURT OF JUSTICE.

##### VII. NISI PRIUS—See TRIAL.

##### VIII. COURT OF REVISION—See ASSESSMENT AND TAXES.

##### IX. OTHER COURTS—See THEIR SEVERAL TITLES.

##### I. POWERS OF.

###### 1. *Generally*.

Held, (O'Connor, J., dissenting,) that the jurisdiction given to the legislature by R. S. O. c. 12, ss. 45 to 48, to punish for a contempt does not restrict the jurisdiction of the courts where the offence is of a criminal character, but that the same act may be in one aspect a contempt of the legislature and in another aspect a misdemeanour. Per O'Connor, J., that in all matters and offences done in contravention of the law and constitution of parliament, with the exception of treason, felony, and breaches of the peace, parliament alone has jurisdiction, and the ordinary courts, civil and criminal, have no jurisdiction. 2. That the *lex et consuetudo parliamenti* reserves to the

High Court of Parliament exclusive jurisdiction to deal with all matters relating to its own dignity, or concerning its powers, its members, and its business, with the above three exceptions. *Regina v. Bunting et al.*, 7 O. R. 524—Q. B. D.

As to the court or tribunal for the determination of matters under the Patent Act, 1872. See *In re The Bell Telephone Company and The Telephone Manufacturing Company and The Minister of Agriculture*, 7 O. R. 605.

Semble, the court has no power to turn a petition from an award of arbitrators under Dominion Railway Act, 1879, into an action. *Re Lea and The Ontario and Quebec Railway*, 8 O. R. 222.—Proudfoot.

It was contended in this case that the revising officer under the Electoral Franchise Act, 48 & 49 Vict. c. 40, was an appointment of the Dominion Government, and that his sittings were sittings of a Court of Record, and that there was no jurisdiction in a Provincial Court to issue a mandamus to him:—Held, that the Dominion Parliament had by the Electoral Franchise Act interfered with civil rights in this province, and having made no provision for a court to superintend the conduct of the officials, and following *Valin v. Langlois*, 3 S. C. R. 1, that until such court is created the Provincial Courts by virtue of their inherent jurisdiction have a right to superintend the discharge of their duties by any inferior officer or tribunal. *Re Simmons and Dalton*, 12 O. R. 505.—Proudfoot.

Jurisdiction of foreign courts in cases of divorce. See *Magurn v. Magurn*, 11 A. R. 178.

Held, that an inferior court has no jurisdiction to entertain an action brought upon the judgment of a Superior Court. *Re Eberts et al. v. Brooke*, 10 P. R. 257.—Galt. Reversed, S. C., 11 P. R. 296—Q. B. D.

See *Regina v. Bunting et al.*, 7 O. R. 118, pp. 163, 167.

##### II. CONFLICT OF CASES.

When a decision of the Court of Appeal in England is at variance with a decision of the Court of Appeal of this province, the latter should be followed here, as the former court is not the court of ultimate appeal for the province: *Sutton v. Sutton*, 22 Chy. D. 511, not followed. *MacDonald v. McDonald*, 11 O. R. 187.—Proudfoot.—Chy. D.

See also *Gould v. Beattie*, 11 P. R. 329; *Grand Junction Railway Co. v. County of Peterborough*, 13 A. R. 420.

#### COVENANT.

##### I. GENERALLY, 155.

##### II. IN CONTRACTS RELATING TO LAND.

1. *Generally*, 155.

2. *Forfeiture*, 157.

3. *Covenants for Title*—See COVENANTS FOR TITLE.

4. *In Leases*—See LANDLORD AND TENANT.

##### III. OTHER CONTRACTS, 159.

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## I. GENERALLY.

The general rule is, that where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void, but where you can sever them, whether the illegality be created by the statute or by the common law, you may reject the bad part, and retain the good. *Kitching v. Hicks et al.*, 6 O. R. 739—Chy. D.—Osler.

Semble, the rule stated in Rawle on Covenants, 4th ed., p. 536, that when two persons jointly covenant with another, a joint action lies for the covenantee on a breach of covenant by one of the covenantees only, because they are sureties for each other for the due performance of the covenant, should be limited to the case of antecedent breaches, and not be extended to promissory engagements in the absence of language imputing such suretyship in regard to future acts or breaches. *Elliott v. Stanley*, 7 O. R. 350.—Boyd.

## II. IN CONTRACTS RELATING TO LAND.

## I. Generally.

M. gave a mortgage to T. on certain lands. The mortgage was in the statutory short form, except that immediately after the printed covenant for payment the following words were inserted in writing: "It being understood, however, that the said lands only shall in any event be liable for the payment of the mortgage." The distress clause remained unaltered in its usual place, viz : after the covenants. T. assigned the mortgage to H., who, on an instalment of interest falling due, distrained for it. M. now brought this action for a wrongful distress:—Held, that M. was entitled to recover the amount distrained for with interest and costs, for the earlier provision controlled the subsequent one, both because it was first in the deed and because it was in writing, and the words superadded in writing were entitled to have greater effect attributed to them than the printed clauses. *Green v. Duckett*, L. R. 11 Q. B. D. 275, followed, as to the right to recover moneys paid under protest. *McKay et al. v. Howard*, 6 O. R. 135.—Boyd.

W. sold land to H., and covenanted to indemnify him against a mortgage thereon:—Held, that H. was not entitled to solicitor and client, but only to party and party, costs of an action on the covenant. *Hutton v. Wanser*, 11 P. R. 302.—Proudfoot.

By a contract for the sale and purchase of land the vendee agreed to pay \$4,000, part of the purchase money, on the execution of the agreement (which was paid accordingly) and an additional portion of the purchase money was to be paid within sixty days thereafter, the balance remaining out on mortgage. After the expiration of the sixty days the vendor instituted proceedings to recover the amount agreed to be then paid, and at the trial, Cameron, J., directed judgment to be entered for the defendants with liberty to the plaintiff to bring a fresh action which by an order of the Divisional Court, was set aside, (3 O. R. 573.) On appeal, this court (Hagarty, C. J. O., dissenting) discharged that order, with costs. Per Burton and Patterson, J.J.A. The agreement to convey the lands, and that to pay the money at the expiration of sixty

days, were not mutual but dependent, so that the vendor before being entitled to recover the purchase money must show that he was ready, willing, and able to convey; and that the purchaser, until he did so, could not be called on to pay his money and rely on the ability of the vendor to convey the estate, or in the event of his being unable to do so, look to him for repayment. Per Rose, J., without determining that point expressly, the neglect and delay of the vendor to take the necessary steps to show his title to the lands, part of which the vendor admitted was vested in one Y., were such as disentitled him to call for payment, and therefore that the finding of the judge at the trial was correct. *McDonald v. Murray et al.*, 11 A. R. 101.

D. sold to the predecessor in title of the plaintiff certain lands, and the deed contained the following (which was held to amount to a covenant, the benefit of which passed to the plaintiff):—"Bellevue square is private property, but it is always to remain unbuilt upon except one residence with the necessary outbuildings including porter's lodge." The land having been sold under a mortgage, a portion came again to the hands of D., who proceeded to convey parts of it for building purposes:—Held, that D.'s liability under the restrictive agreement not to build on Bellevue square, revived on his again acquiring the property. *VanKoughnet v. Denison*, 11 A. R. 699.

On the 1st December, 1870, A. M., by deed, conveyed certain lands to his grandsons W. M. and D. M., as tenants in common; and on the same day an agreement in writing was made between the parties whereby W. M. and D. M. agreed to pay the following sums of money, and fulfil the agreement, namely, that W. M. and D. M. should thenceforward support their mother, the plaintiff, and furnish her with reasonable, suitable, and comfortable board, lodging, and clothing, and medical attendance during her lifetime, and maintain her in a proper manner; and in the event of any disagreement between W. M. and D. M., and the plaintiff, whereby she would be obliged to leave the said premises, they were to pay her \$55 a year in lieu of such board, &c., and, if not paid, to be recoverable by suit at law. The covenants, payments and annuities to be chargeable against the said land. The plaintiff was no party to the agreement. On the 4th of October, 1872, the defendant W. M., for a nominal consideration of \$1,000, conveyed his undivided half interest to the plaintiff, but of which she said she was not aware; and on 1st March, 1877, she reconveyed the same to W. M. "free from incumbrances." On 12th January, 1882, D. M. sold his undivided half interest to C., and a conveyance was executed, but the sale was never carried through. On 27th September, 1883, D. M. sold his said interest to G. A. B., and, to save registration charges, the conveyance was made by C. to G. A. B. On 20th March, 1884, G. A. B. conveyed to E. and S., who in May, 1884, ejected the plaintiff from the land. The agreement was not registered until 27th January, 1882:—Held, reversing the judgment of Galt, J., at the trial, that the agreement did not create a rent charge, as no power of distress was conferred; that if either a rent service or rent seek there would be a right of distress and apportionment, but if neither, but a covenant charged on land, performance of it would be decreed; that

upon the conveyance of the whole charge, apportionment was made against D. M.'s hands of E. and S., who were purchasers. *Cashill et al.*, 13

The defendant, executor of J. D., the agent of M. lateral security agent, in all ab executed an ass. a legatee and pose of securing same time giving same object. H. such mortgage, equity of redemption mortgage; that more than they should convey the for \$30, by consequence H. ed from S. C. and the R. mortgage, covenant of M. for an alleged contract a conveyance of afterwards sold amount of H.'s estate C. did not exceed substituted by H. against reversed the judgment Division, 10 O. R. ing H.'s dealings to enforce payment. *McLean*, 13 A.

The defendant in which he conveyed money in nine years to clear up and five years from the build a log house and there was a should immediately after default being clearing the land mentioned." No the mortgage money built until about a first year, nor were than ten were clear was entitled to insisted terms of payment breach of covenant and to judgment but should have no forfeitures for nonpayment cases for neglecting in which default likely against:—Semble, been the not putting forfeiture would have clearing of the land that covenant:—S. since equity will not a mortgage that on

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upon the conveyance by W. M. to the plaintiff, the whole charge was not extinguished, but an apportionment took place; and that therefore defendant was entitled to enforce performance against D. M.'s undivided half interest, in the hands of E. and S., whom the evidence shewed were purchasers with notice. *McCaskill v. McCaskill et al.*, 12 O. R. 783—C. P. D.

The defendant M. had in his possession as executor of J. D. C. a mortgage of one R., which the agent of M. had deposited with H. as collateral security for moneys advanced to such agent, in all about \$400. Some years after M. executed an assignment of this mortgage to S., a legatee under the will for the alleged purpose of securing payment of her legacy; at the same time giving a personal covenant for the same object. H. assuming to act as owner of such mortgage, wrote to the persons owning the equity of redemption, that he controlled the mortgage; that the lands were incumbered for more than their value, and suggesting that they should convey their right to him. This they did for \$30, by conveying to a trustee for H. and subsequently H. in consideration of \$500 obtained from S. C. an assignment of her interest in the R. mortgage, and also an assignment of the covenant of M. H. subsequently sold these lands for an alleged consideration of \$5,000; accepting a conveyance of other lands, which he shortly afterwards sold for \$6,500 cash. The whole amount of H.'s claim, including the \$500 paid S. C., did not exceed \$1,500. In a proceeding instituted by H. against M., this court on appeal reversed the judgment of the Common Pleas Division, 10 O. R. 58, holding that notwithstanding H.'s dealings with the lands he was entitled to enforce payment of M.'s covenant. *Wilkins v. McLean*, 13 A. R. 467.

## 2. Forfeiture.

The defendant gave a mortgage to the plaintiff in which he covenanted to pay the mortgage money in nine equal annual instalments, and also to clear up and fence ten acres in each year for five years from the date of the mortgage, and to build a log house on the land within one year, and there was a proviso, "that the mortgage should immediately become due and payable after default being made in building the house and clearing the land at the periods of time above mentioned." No default occurred in payment of the mortgage money, but the log house was not built until about a month after the expiry of the first year, nor were ten acres fenced, though more than ten were cleared:—Held, that the plaintiff was entitled to insist on a forfeiture of the extended terms of payment in consequence of the breach of covenant as to the erection of the house, and to judgment for redemption or foreclosure, but should have no costs. Relief is given against forfeitures for nonpayment of rent, and in certain cases for neglecting to insure, but no case appears in which default like the present has been relieved against:—Semble, that if the only default had been the not putting up of the fence, the forfeiture would have been relieved against, for the clearing of the land was the substantial part of that covenant:—Semble, also, that in this province equity will not relieve against a proviso in a mortgage that on default of payment of a part

of the debt the whole shall become due. *Graham v. Ross*, 6 O. R. 154.—Hagarty.

H. S. by deed dated November 4, 1863, granted his farm and some chattels to his son T. S. in consideration of \$300, "subject to be defeated and rendered null and void upon the non-performance by the said party of the second part of the following condition, or any part thereof, viz., the said party of the second part covenants to feed, clothe, support and maintain the said party of the first part \* \* \* during the term of his natural life. \* \* \*." T. S. having fulfilled the condition during his lifetime, died on October 5, 1865, leaving a widow and one child. The widow removed from the farm, but offered to take H. S. with her to her father's house, and have him provided for there, or to allow him to go to her brother's house in the same way, both of which offers were declined, and as no maintenance was provided for him by her at the farm he treated the condition as broken, and brought an action of ejectment, and recovered judgment, and conveyed the farm away by deed, and the defendant became the owner by subsequent conveyance. H. S. was subsequently supported, part of the time on the farm, by the defendant, and died in 1880. In an action of ejectment by the infant daughter of T. S., claiming under the deed to her father against the defendant, it was:—Held, affirming the judgment of Armour, J., Proudfoot, J., dissenting, that the grantor was not bound to accept the offers made, and that the conditions of the deed were broken and the land forfeited. Per Armour, J., (at the trial), the deed must be construed as being made upon condition and as being defeated and rendered void by the non-performance of the covenant. The effect of the covenant is, that H. S. was to be maintained wherever he might choose to live, but he was not bound to go to any place the covenantor or his representatives might require him to go, and he was justified in refusing to accept the offers made. Per Boyd, C., the parent who for value purchases the right to support from his son has, if the written instrument is silent on the point, the first and controlling choice as to the place of abode. If the father's wishes are reasonable, having regard to his age and station in life, the court ought to respect them in preference to the counter propositions of those who are to supply the maintenance. There was here no caprice, no unwarrantable obstinacy in the father's resolve to cling to the homestead, such as should induce the court to disregard the general rule. The result is, that the conditions of the deed were broken and the land forfeited. Per Proudfoot, J., the life interest of H. S. was not reserved out of the land, it rested solely on the condition, with probably an equitable charge on the land. The condition is to maintain without specification of place; it imposes no personal obligation on the grantee, it may be fulfilled by any one having an interest in the property, and may be performed wherever the grantee or his representative might reasonably offer. Per Ferguson, J., it was a condition annexed to the estate granted, the proper effect of which was that if broken the title would go to the grantor, or those claiming from him the reversion in the lands; the grantor was not bound to accept the offer that was made, and there was a breach of the condition, the effect of which was to revest the estate. *Millette v. Sabourin*, 12 O. R. 248—Chy. D.

## III. OTHER CONTRACTS.

D., on entering the employment of W. as agent in the vending of teas and coffees, covenanted with W. not to engage in the sale or delivery of teas or coffees in the city of Toronto, either for himself or as agent for any other person for at least two years after leaving W.'s employ. W. now moved for an injunction to restrain D., who had left her employ, from violating the above covenant:—Held, that the covenant was binding upon D., notwithstanding that the consideration for it might have been inadequate:—Held, also, that the above covenant was not invalid on grounds of public policy. A covenant in restraint of trade is not invalid unless the restraint is larger and wider than the protection of the covenantee can possibly require. *Wicherv. Darling*, 9 O. R. 311.—Rose.

Covenant to warrant and defend assignee in possession of a patent within the territory thereby granted. See *Green et al. v. Watson*, 10 A. R. 113.

By a covenant for payment contained in a mortgage deed, given by the defendant to the plaintiff as collateral security for a note for \$3,000, payable with interest at the rate of 2 per cent. a month until paid, the defendant covenanted to pay "the said sum of \$3,000, on the 11th day of July, 1862, with interest thereon at the rate of 24 per cent. per annum until paid:"—Held, that the proper construction of the terms of both the note and the covenant as to payment of interest was, that interest at the rate of 24 per cent. should be paid up to the 11th July, 1862, and not that interest should be paid at that rate after such day if the principal should then remain unpaid. *St. John v. Rykert*, 10 S. C. R. 278.

Where there was a covenant by defendant that one-half of the surplus proceeds of goods, transferred by the plaintiff to the defendant after deduction of liabilities, should be paid to the plaintiff by the defendant by his promissory note at two years, with a proviso that should the defendant, or the firm of T. & S., of which the defendant was a member, dispose of their business, or make an assignment for the benefit of creditors, the note should become due, and S. subsequently retired from the business and transferred to the defendant all his interest therein:—Held, that the transfer by S. to T. was not a breach of the covenant, and that the time of payment of the note was not thereby accelerated. *Masters v. Threlkeld*, 12 O. R. 645—Q. B. D.

## COVENANTS FOR TITLE.

## I. COVENANTS RUNNING WITH THE LAND, 159.

## II. OTHER COVENANTS.

1. *Damages*, 160.
2. *Other Cases*, 161.

## I. COVENANTS RUNNING WITH THE LAND.

C. and the defendant were owners of adjacent lots, and C. being about to build on his lot agreed by writing under seal to erect a party-wall on the dividing line, and equally on both lots, defendant agreeing to pay for the half of the front forty feet

thereof when erected, and for the rear portion thereof whenever defendant should require to use it. Subsequently C. sold and conveyed his lot to the plaintiffs in fee by deed containing the usual statutory covenants, and the plaintiffs entered into possession. Some years later defendant erected a building on his lot, making use of the rear part of such party-wall, by reason of which he became liable to pay \$98.65 and interest therefor, and did accordingly pay the same to C. In an action by the plaintiffs, as assignees of C.'s interest in said land, against the defendant to recover the sum so due in respect of such wall:—Held, that the plaintiffs were not entitled as vendees of C. to recover, the right to payment of the sum stipulated to be paid for the wall under the covenant with C. not having passed under the conveyance by C. to the plaintiffs. *Kenny v. Mackenzie*, 12 A. R. 346.

Held, that a married woman, though married before May 4th, 1859, was not bound by a covenant of her husband, entered into by him for himself, his heirs and assigns, as lessor of certain lands, to pay at the expiration of the lease for a certain malthouse which the lessee was to have liberty to erect on the demised premises, though the reversion had been assigned to her husband and another as trustees for her, in such a way that she had the entire beneficial interest, and though the covenant ran with the land:—Held, also, that a claim on behalf of the said trustees for rent in arrear and for damages for non-repair was not matter of set-off against damages recovered against the husband for breach of his covenant to purchase the malthouse, though he was one of the trustees, they not being matters arising in the same right. *Ambrose v. Fraser et al.*, 12 O. R. 459.—Ferguson.

See *Platt v. The Grand Trunk R. W. Co. of Canada*, 10 O. R. 246, *infra*; *Van Koughnet v. Denison*, 11 A. R. 699, p. 156. See also *Crawford v. Bugg*, 12 O. R. 8.

## II. OTHER COVENANTS.

1. *Damages*.

S. P. brought an action for damages sustained and to be sustained by reason of breaches of covenants for title in a conveyance of certain lands to him, and before the trial died intestate, whereupon his administratrix took out an order of revivor, which order it was now sought to set aside on the ground that the right of action did not survive to her:—Held, that as to damages which accrued during the lifetime of S. P., his administratrix was entitled to sue for the same; but that this was not so as to damages which might have accrued since his death, for which:—Sensible, the heir, or devisee, might bring an action. In the case of such covenants running with the land, where only a formal breach takes place in the life of the ancestor, the remedy for damages accruing after his death passes to the heir or devisee; but where not only the breach took place, but damages accrued in the lifetime of the ancestor, the remedy for these damages passes to the personal representative. *Platt v. The Grand Trunk Railway Company of Canada*, 11 O. R. 246.—Proudfoot.

See *Platt v. The Grand Trunk Railway Company of Canada*, 12 O. R. 119, p. 162.

It is a firm (Ontario) that work an estoppel England. *Cros* 412.—Proudfoot

On February to A. T. P., (the plaintiff in this the river Maitland which was the river high enough of the river, the by the deed, and right to convey company had p serving any of the an island in the parcels of land, opposite each other the plaintiff, Meadow," and were above the subsequently be in an action by brought, M. A. of revivor,) again and proved that across the river he of the fall of the part of, if not the ming back water and "Block F," and H. Y. A. as lands. It was coendants that the should be made p s. 17, subs. 5, enal possession of land given no notice of sue to prevent of any trespass or his own name on rant of parties ou that in an action ment a plaintiff i destruction of the om to recover, a mpted to enjoy h in the place and m been interrupted, vement for quiet he covenant for ti of Canada had dec R. 425, that the easement to A. g here, although the suit; and th on as it was made such damages as g; and, following Jones, 19 C. P. 2 e the difference in the estate that had sed purported to e anted they had t eared that during ent had construct of the river, and th damages "on accou of the waters by t ater, and forcing

## 2. Other Cases.

It is a firmly established rule of property in Ontario that covenants for title are sufficient to work an estoppel, though it is otherwise held in England. *Casselman et al. v. Casselman*, 9 O. R. 412.—Proudfoot.

On February 3rd, 1873, the company granted to A. T. P., (through whom S. P., the original plaintiff in this action, claimed,) a mill site on the river Maitland with certain easements, one of which was the right to erect a dam across the river high enough to take up eight feet of the fall of the river, the location of the dam being defined by the deed, and covenanted that they had the right to convey and for quiet enjoyment. The company had previously granted, (without reserving any of the easements granted to A. T. P.,) an island in the river called "Island C," and two parcels of land, one on each bank, immediately opposite each other, and adjoining the property of the plaintiff, called respectively "The Great Meadow," and "Block F," all three of which were above the land granted to A. T. P., and subsequently became the property of H. Y. A. In an action by S. P., (who died after action brought, M. A. P. being made plaintiff by order of revivor,) against the company, it was alleged and proved that a dam could not be maintained across the river high enough to take up eight feet of the fall of the river without submerging a great part of, if not the whole of "Island C," and penning back water and ice on "The Great Meadow," and "Block F," and encroaching upon the rights of H. Y. A. as riparian proprietor of the said lands. It was contended on the part of the defendants that the mortgages of the property should be made parties:—Held, that O. J. Act, 17, subs. 5, enables a mortgagor, entitled to the possession of land, as to which the mortgagee has given no notice of his intention to take possession, to sue to prevent or recover damages in respect of any trespass or other wrong relative thereto in his own name only, and that the objection for want of parties ought not to prevail:—Held, also, that in an action on a covenant for quiet enjoyment a plaintiff must shew an interruption or obstruction of the easement in order to entitle him to recover, and that S. P. not having attempted to enjoy his easement by building a dam in the place and manner specified, and not having been interrupted, he could not succeed on the covenant for quiet enjoyment:—Held, also, as to the covenant for title, that as the Supreme Court of Canada had decided in *Platt v. Attrill*, 10 S. R. 425, that the company had no right to grant the easement to A. T. P., that decision was binding here, although the company were not parties to the suit; and that the covenant was broken as soon as it was made, and the plaintiff was entitled to such damages as accrued during the life of S. P.; and, following *The Empire Gold Mining Co. v. Jones*, 19 C. P. 245, that the damages would be the difference in money between the value of the estate that had passed, and that which the deed purported to convey, and the company covenanted they had the right to convey. It appeared that during S. P.'s ownership the government had constructed a breakwater at the mouth of the river, and that S. P. had been awarded damages "on account of the penning or damming of the waters by the construction of the breakwater, and forcing them back on S. P.'s prop-

erty," and on another account not material to this action:—Held, that as the sum awarded was a lump sum for both accounts together, and as the evidence on the arbitration shewed that the breakwater only affected S. P. to the extent of three feet of water, leaving him a fall of five feet, the value of which could only be ascertained by a reference, and as the subjects of the arbitration and the action on the covenant were not the same, the company were not entitled to set off the money recovered from the government against their liability for damages for their breach of contract:—Held, also, that the registration of the previous conveyances, even if that was notice, was no bar to a recovery on the covenant. The plaintiff, therefore, was held entitled to damages for breach of the covenant for title, and a reference was directed. *Platt v. The Grand Trunk Railway Company of Canada*, 12 O. R. 119.—Proudfoot.

## CREDITOR AND DEBTOR.

S. G. acquired during the life of his first wife M. A. B., certain immovable property which formed part of the communauté de biens existing between them. At his death, after his marriage with H. S., his second wife, he was greatly involved. His widow H. S., having accepted sous bénéfice d'inventaire the universal usufructuary legacy made in her favour by S. G., continued in possession of her estate as well as that of M. A. B., the first wife, and administered them both, employing one G. to collect, pay debts, &c. Shortly afterwards, at a meeting of the creditors of S. G., of whom the respondents were the chief, a resolution was adopted authorizing H. S. to sell and licitate the properties belonging to the estate of S. G., with the advice of an advocate and the cashier of the respondents, and promising to ratify anything done on their advice, and the creditors resolved that the moneys derived from the sale or licitation of the properties should be deposited with the respondents, to be apportioned among S. G.'s creditors pro rata. G. continued to collect the fruits and revenues and rents, and acted generally for H. S. and under the advice aforesaid, and deposited both the moneys derived from the estate of S. G. and those derived from the estate of M. A. B., the first wife, with the respondents, under an account headed "Succession S. G." A balance remained after some cheques thereupon had been paid, for which this action was now brought by the heirs and representatives of Dame M. A. B.:—Held, per Strong, Taschereau and Gwynne, JJ., (Ritchie, C.J., and Fournier and Henry, JJ., contra,) that as between the heirs B. and the bank there was no relation of creditor and debtor, nor any fiduciary relation, nor any privity whatever; and as the moneys collected by G. belonging to the heirs of B. were so collected by him as the agent of H. S., and not as the agent of the bank, and received by the bank in good faith, as applicable to the debts of the estate of S. G., and as the representatives of H. S. were not parties to the action, the appellants could not recover the moneys sued for. *Giraldi v. La Banque Jacques Cartier*, 9 S. C. R. 597.

See also *Jack v. Jack—Morgan's Case*, 12 A. R. 476.



## CREDITORS' RELIEF ACT.

The plaintiffs placed a writ of execution against the defendant in the hands of the sheriff of Ontario, on the 6th December, 1884. The sheriff seized the defendant's goods on the 8th December. The defendant made a mortgage of his goods to D. on the 9th December. B. placed a second execution against the defendant in the hands of the sheriff on the 22nd December. On the 31st December the mortgagee D., paid to the sheriff the whole amount of the first execution, \$115, specially appropriating the payment to that execution:—Held, that the money paid to the sheriff was not levied by him within the meaning of the Creditors' Relief Act, 43 Vict. c. 10, (Ont.) and that the first execution creditor was entitled to the whole of it. *Daries Browning and Maltling Company v. Smith*, 10 P. R. 627.—Dalton, Master.—Rose.

Since the coming into force of the Creditors' Relief Act of 1880, March 25th, 1884, execution creditors who obtain stop orders on funds in court do not obtain any priority thereby, but all must share ratably. As some of the provisions of the statute are to enable simple contract creditors to come in and obtain the position of execution creditors, they must have the same right with regard to funds in court as they would have with regard to funds in the sheriff's hands, and in any case where an execution creditor obtains a stop order there must be a reference to the master to ascertain if any other creditors desire to ask a share of the fund. *Darson v. Moffatt*, 11 O. R. 484—Chy. D.

Held, affirming the judgment of the County Court of Perth, that the creditor under whose execution an amount in the hands of a sheriff for distribution under the Creditors' Relief Act, 1880, was levied, and which was insufficient to pay all claims in full, was not entitled to priority of payment of the costs of obtaining a judgment and execution. *Porteous v. Myers*, 12 A. R. 85 See 49 Vict. c. 16 s. 35. (Ont.).

The plaintiffs obtained execution against one D. under which a seizure was made, when the defendant and another party made claim to the goods under a chattel mortgage, in consequence of which the usual interpleader order was issued, and default having been made in payment into court or giving security for the appraised value of the goods, the same were sold and the proceeds paid into court. The trial of the issue resulted in favour of the claimants, but on appeal the claim of the defendants was disallowed, and the demand of the other claimant was paid. Before the trial took place the defendants placed an execution for the amount of their demand in the sheriff's hands against the goods of D. When finally disposing of the matter the judge of the County Court directed that the money in court should, after payment of certain costs, be paid out to the plaintiffs and defendants ratably according to their respective claims under the Creditors' Relief Act, 43 Vict. c. 10, (Ont.), the plaintiffs thereupon appealed, and on the hearing, the court being equally divided, the appeal was dismissed, with costs. Per Patterson, J., Osh. J.J.A. The moneys were properly distributable under the statute. Per Haggerty, J. O. and Burton, J.A. These moneys were not moneys "made or levied under execution," and therefore

did not come within the provisions of the Act. *Reid v. Gowans*, 13 A. R. 501.

See *Macfie v. Pearson*, 8 O. R. 745, p. 3; *Dominion Bank v. Heffernan et al.*, 11 P. R. 504, p. 137.

## CRIMINAL LAW.

- I. BRIBERY, 164.
- II. CONSPIRACY, 164.
- III. FRAUDULENTLY DEPRIVING OF THE USE OF PROPERTY, 165.
- IV. FORGERY, 165.
- V. FRAUDULENT REMOVAL OF GOODS, 166.
- VI. GAMING—See GAMING.
- VII. LARCENY, 166.
- VIII. REFUSING TO PROVIDE FOR FAMILY, 166.
- IX. VAGRANCY—See VAGRANT.
- X. OTHER OFFENCES, 166.
- XI. PROCEDURE.
  - 1. *Indictment*, 166.
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- XII. EVIDENCE.
  - 1. *Accomplice*, 167.
  - 2. *Other Cases*, 167.
- XIII. COMPROMISING PROSECUTIONS—See COMPROMISE.
- XIV. EXTRADITION OF CRIMINALS—See EXTRADITION.
- XV. SUMMARY CONVICTIONS—See JUSTICES OF THE PEACE.

## I. BRIBERY.

See *Regina v. Bunting et al.*, 7 O. R. 524, p. 165.

## II. CONSPIRACY.

On demurrer to an indictment (set out in the report of the case) for conspiracy to bring about a change in the government of the province of Ontario, by bribing members of the legislature to vote against the government:—Held, O'Connor, J., dissenting. 1. That an indictable offence was disclosed: that a conspiracy to bribe members of parliament is a misdemeanour at common law, and as such indictable. 2. That the jurisdiction given to the legislature by R. S. O. c. 16 ss. 45, 46, 47, 48, to punish as for a contempt does not oust the jurisdiction of the courts where the offence is of a criminal character, but that the same act may be in one aspect a contempt of the legislature, and in another aspect a misdemeanour. 3. That the Legislative Assembly has no criminal jurisdiction, and hence no jurisdiction over the matter considered as a criminal offence. 4. That the indictment, considered as a criminal offence, disclosed the offence intended to be charged. Per O'Connor, J.—1. That the bribery of a member of parliament, in a matter concerning parliament or parliamentary business, is not an indictable offence at common law.

and has not been. That in all matters of intervention of the law with the execution of breaches of the dictation, and the national, have no jurisdiction. Court of Parliament deal with all matters concerning business, with the *jud v. Bunting*

## III. FRAUDULENTLY DEPRIVING OF THE USE OF PROPERTY.

The defendant a horse-power and trade of a butler interest to C. T. from one M., and term of hiring M. demanded it purchased it from then employed a premises where it was which he did. tried before a police an offence against. Held, that the no offence against in the police magistrates it was had also in of the commission the improper use civil rights. *Regina v. Bunting et al.*

Held, that the act to one of the denotation consisting in the figure 2, where margin of the note prisoner was right *v. Bail*, 7 O. R. 25

The prisoner was first count charged note of the Nation second with utter The prisoner was the fact. Evidence two persons named convicted in Montreal with F. registered their names and occupied adjacent H. had been convicted their guilt number of these citizens and H., which were prisoner. Before it was proved that with W., who was far notes. Evidence that a large number sealed at a place been seen, and was by him, after W. had



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and has not been made so by any statute. 2. That in all matters and offences done in contravention of the law and constitution of parliament, with the exception of treason, felony, and breaches of the peace, parliament alone has jurisdiction, and the ordinary courts, civil and criminal, have no jurisdiction. 3. That the *lex et consuetudo Parliamenti* reserves to the High Court of Parliament exclusive jurisdiction to deal with all matters relating to its own dignity, or concerning its powers, its members, and its business, with the above three exceptions. *Regina v. Bunting et al.*, 7 O. R. 524—Q. B. D.

### III. FRAUDULENTLY DEPRIVING OF THE USE OF PROPERTY.

The defendant sold to C., amongst other things, a horse-power and belt, part of his stock in the trade of a butcher, in which he also sold a half interest to C. The horse-power had been hired from one M., and at the time of the sale, the term of hiring had not expired. At its expiry, M. demanded it, and C. claimed that he had purchased it from defendant. The defendant then employed a man to take it out of the premises where it was kept, and deliver it to M., which he did. The defendant was summarily tried before a police magistrate and convicted of an offence against 32-33 Vict. c. 21, s. 110, (Dom):—Held, that the conviction was bad, there being no offence against that section, and no jurisdiction in the police magistrate to try summarily; that it was bad also in not showing the time and place of the commission of the offence. Remarks upon the improper use of the criminal law in aid of civil rights. *Regina v. Young*, 5 O. R. 400.—Rose.

### IV. FORGERY.

Held, that the alteration of a \$2 Dominion note to one of the denomination of \$20, such alteration consisting in the addition of a cypher after the figure 2, wherever that figure occurred in the margin of the note, was forgery, and that the prisoner was rightly convicted thereof. *Regina v. Bail*, 7 O. R. 228—Q. B. D.

The prisoner was indicted along with W.; the first count charging W. with forging a circular note of the National Bank of Scotland; and the second with uttering it knowing it to be forged. The prisoner was charged as an accessory before the fact. Evidence was admitted showing that two persons named F. and H. had been tried and convicted in Montreal of uttering similar forged circular notes printed from the same plate as those uttered by W.; that the prisoner was in Montreal with F., they having arrived and registered their names together at the same hotel, and occupied adjoining rooms; that after F. and H. had been convicted on one charge, they admitted their guilt on several others; and that a number of these circular notes were found on F. and H., which were produced at the trial of the prisoner. Before the evidence was tendered, it was proved that the prisoner was in company with W., who was proved to have uttered similar notes. Evidence was also admitted showing that a large number of the notes were found concealed at a place near where the prisoner had been seen, and were concealed, as was alleged by him, after W. had been arrested:—Held, that

the evidence was properly received in proof of the guilty knowledge of the prisoner. *Regina v. Bent*, 10 O. R. 559—C. P. D.

### V. FRAUDULENT REMOVAL OF GOODS.

The fraudulent removal of goods, under 11 Geo. II. c. 19, s. 4, is a crime, and a conviction therefor was consequently quashed, with costs against the landlord, because the defendant had been compelled to give evidence on the prosecution. *Regina v. Lackie*, 7 O. R. 431.—Rose.

### VII. LARCENY.

The prisoner was indicted for larceny under the Indian Act of 1880, 43 Vict. c. 28, s. 60, (Dom.) and was convicted:—Held, (Wilson, J., dissenting,) that he ought not to have been convicted, because, (per Armour, J.,) the wood, the subject of the alleged larceny, was not in the absence of satisfactory information, supported by affidavit, "seized and detained as subject to forfeiture" under the Act; and because, (per O'Connor, J.,) the affidavit required by sec. 64 had not been made, and was a condition precedent to a seizure. Per Wilson, C. J., section 64 cannot apply to trees found by the officer of the department in the act of being removed from the lot on which they have been wrongfully cut, or where there can be no doubt they have been unlawfully cut, for such an application would make it impossible to effect a seizure in such cases. *Regina v. Fearman*, 10 O. R. 660—Q. B. D.

### VIII. REFUSING TO PROVIDE FOR FAMILY.

See *Regina v. Meyer*, 11 P. R. 477, p. 168.

### X. OTHER OFFENCES.

Indictment to compel repair of highway. See *In re The Corporations of the Townships of Moulton and Canborough and the Corporation of the County of Haldimand*, 12 A. R. 503.

Quare, as to whether one company using electric wires are liable to indictment for interfering with the wires of another company. See *Bell Telephone Company v. Belleville Electric Light Company*, 12 O. R. 571.

### XI. PROCEDURE.

#### 1. Indictment.

An indictment was found against the defendants in the High Court of Justice at its sittings of Oyer and Terminer and Gaol Delivery, and on being called upon to plead the defendants demurred to the indictment. A writ of certiorari was subsequently obtained by the defendants, in obedience to which the indictment, demurrer, and joinder were removed to the Queen's Bench Division. Upon the return the Crown took out a side-bar rule for a concilium, and the demurrer was set down for argument. A motion was made by the defendants to set aside the proceedings of the Crown on the ground that they should have been called upon to appear and plead *de novo* in this division:—Held, (Wilson, C. J., dissenting,) that the Court of Assize of Oyer and Terminer

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## CROSS JUDGMENT.

See JUDGMENT.

## CROWN.

I. PETITION OF RIGHT—See PETITION OF RIGHT.

II. CROWN LANDS—See CROWN LANDS.

III. CROWN TIMBER—See CROWN LANDS.

IV. PRESCRIPTION AGAINST THE CROWN—See LIMITATION OF ACTIONS.

The bank of Prince Edward Island became insolvent and a winding-up order was made on the 4th June, 1882. At the time of its insolvency the bank was indebted to Her Majesty in the sum of \$93,494.20, being part of the public moneys of Canada which had been deposited by several departments of the government to the credit of the Receiver General. The first claim against the bank by the minister of finance at the request of the respondents (liquidators of the bank) did not specially notify the liquidators that Her Majesty would insist upon the privilege of being paid in full. Two dividends of 15 per cent. each were afterwards paid, and on the 28th February, 1884, there was a balance due of \$65,426.95. On that day the respondents were notified that Her Majesty intended to insist upon her prerogative right to be paid in full. At this time the liquidators had in their hands a sum sufficient to pay in full Her Majesty's claims. The following objection to the claim was allowed by the Supreme Court of Prince Edward Island, viz.: "That Her Majesty the Queen, represented by the minister of finance and the receiver general has no prerogative or other right to receive from the bank of Prince Edward Island the whole amount due to Her Majesty, as claimed by the proof thereof, and has only a right to receive dividends as an ordinary creditor of the above banking company. On appeal to the Supreme Court of Canada:—Held, reversing the judgment of the court below, (1) that the Crown claiming as a simple contract creditor has a right to priority over other creditors of equal degree. This prerogative privilege belongs to the Crown as representing the Dominion of Canada, when claiming as a creditor of a provincial corporation in a provincial court, and is not taken away in proceedings in insolvency by 45 Vict. c. 22; (2) that the Crown had not waived its right to be preferred in this case by the form in which the claim was made and by the acceptance of two dividends. *Regina v. The Bank of Prince Scotia*, 11 S. C. R. 1.

Certain lands on which were two roads called "Water street" and "The Road to the Wharf," being required for public works, were expropriated by the Dominion Government, and the compensation therefor was claimed by the corporation of the village in which the roads were, and by one R. S. C. through or over whose lands the roads ran. It appeared that the roads were established as public highways by the municipal authorities by by-laws in the years 1842 and 1845, respectively, under 4 & 5 Vict. c. 10, ss. 39 and 51, although no compensation was paid to

the owners thereof:—Held, that although originally the soil and freehold of the roads or streets may have remained in the private owner, subject to the public easement (the right of user), since the year 1858, at all events, they became vested in the Crown as representing the Province of Ontario, by virtue of 22 Vict. c. 99, s. 301, and that the compensation therefor was payable to the Attorney-General of Ontario, who was ordered to be made a party in order to give protection to the Dominion Government in expropriating the land. *Re Trent Valley Canal—"Re Water Street" and "The Road to the Wharf,"* 11 O. R. 687.—Boyd.

## CROWN LANDS.

I. DOMINION LANDS ACT, 170.

II. CROWN PATENTS, 171.

1. Description of Land in—See DEED.

III. TIMBER LICENSES, 172.

IV. HIGHWAYS VESTED IN THE CROWN, 173.

V. INDIAN LANDS—See INDIAN LANDS.

VI. ASSESSMENT OF—See ASSESSMENT AND TAXES.

VII. PRESCRIPTION AGAINST THE CROWN—See LIMITATION OF ACTIONS.

## I. DOMINION LANDS ACT.

The plaintiff in his bill of complaint, alleged in the sixth paragraph as follows: "Prior to the 1st of May, 1875, the plaintiff made application to homestead the said lands in question herein, and procured proper affidavits, according to the statute, whereby he proved to the satisfaction of the Dominion lands agent in that behalf, (and the plaintiff charges the same to be true,) that the said defendant Farmer had never settled on or improved the said lands assumed to be homesteaded by him or the lands herein in question, but had been absent therefrom continuously since his pretended homesteading and preemption entries, and thereupon the claim of the defendant Farmer under the said entries became and was forthwith forfeited, and any pretended rights of the defendant Farmer thereunder ceased, and the plaintiff thereunder, on or about the 8th May, 1875, and then and there with the assent and by the direction of the Dominion lands agent, who caused the same to be prepared for the plaintiff, signed an application for a homestead right to the lands in question in this suit, according to form A, mentioned in 35 Vict. c. 23, s. 33, and did make and swear to an affidavit according to form B, mentioned in sec. 33, sub-s. 7, of the same Act, and did pay to the same agent the homestead fee of \$10, who accepted and received the same as the homestead fee, and thereupon the plaintiff was informed that he had done all that was necessary or required for him to do under the statute and the regulations of the department, and that the statute said: Upon making this affidavit and filing it, and on payment of an office fee of \$10, (for which he shall receive a receipt from the agent,) he should be permitted to enter the lands specified in the application; and thereupon and in pursuance thereof, and in good faith, the plaintiff did forthwith enter upon said land and

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the department, to be applied on account of the intended purchase. On the 9th May the company gave out a contract for the clearing of a portion of the land, and on the 10th July, 1881, the commissioner executed a deed of sale in favour of the company, subject, amongst other conditions, "to the current licenses to cut timber on the lots." Upon the writ being returned, the injunction was suspended. G. B. H. et al. answered the petition, and the Superior Court dissolved the injunction. On appeal to the Court of Queen's Bench, this judgment was reversed and the injunction applied for made perpetual. On appeal to the Supreme Court of Canada it was held, (Henry and Gwynne, J.J., dissenting), that the D. of C. L. & C. Co. had not acquired any valid title to the lands in question prior to the 19th July, 1881, and that by the instrument of that date their rights were subordinated to all current licenses, and G. B. H. et al. having established their right to possess said lands for the purpose of carrying on their lumber operations under a license from the Crown, dated 3rd May, 1881, the injunction granted ex parte to the D. of C. L. & C. Co., in November, 1881, under the provisions of 41 Viet. c. 14 (Que.), had been properly dissolved by the Superior Court. *Hall v. Canada Land and Colonization Company*, 8 S. C. R. 631.

See *Sinnott v. Scoble*, 11 S. C. R. 571, p. 171.

#### IV. HIGHWAYS VESTED IN THE CROWN.

See *Re Trent Valley Canal*—"Re Water Street" and "*The Road to the Wharf*," 11 O. R. 687, p. 170.

#### CROWN TIMBER.

See CROWN LANDS.

#### CUSTODY OF INFANTS.

See INFANT.

#### CUSTOM AND USAGE.

Held, that the colt in question in this case, five weeks old, following its dam, could not be said to be running at large, the universal custom of the country, which ought to govern, being for colts thus to follow the dam:—Held, also, that evidence of the common use of barbed wire fences in other townships, and that other municipalities held out inducements to erect them, should not have been rejected, as shewing that they were not considered dangerous or a nuisance. *Hillard v. Grand Trunk Railway Company*, 8 O. R. 583—Q. B. D.

At the trial of this case the bank manager to whom the draft was returned was asked, "What do you understand by the words added by defendant?" To this question objection was taken, and the judge ruled that in the absence of evidence (which it was admitted could not be given), that by the usage of bankers the words complained of had a meaning other than that conveyed by them in their natural construction, the question could not be put:—Held, that the usage of bankers

could not in any way be the rule by which the meaning of such words could be held to be governed, but (following *Daines v. Hartley*, 3 Ex. 200) that nevertheless a proper foundation had not been laid for the question; that the witness should first have been asked if there were any circumstances which would lead him to understand the words in other than their natural sense, and that upon proof of such circumstances the question would have been allowable. As, however, the judge's ruling had precluded the plaintiff's counsel from laying such a foundation, a new trial was ordered. *Huber v. Crookall*, 10 O. R. 475—Q. B. D.

Custom of brokers in dealing with customers' stock. See *Mara v. Cox et al.*, 6 O. R. 359; *Sutherland v. Cox*, 13 A. R. 525.

See *Re McDougall*, 12 A. R. 265, p. 49. See also *Page v. Proctor*, 5 O. R. 238; *Attrill v. Platt*, 10 S. C. R. 25.

#### DAMAGES.

##### I. GENERALLY, 174.

##### II. REFERENCE TO MASTER—See TRIAL.

##### III. ACTIONS ON CONTRACTS.

1. *For Non-delivery of Goods*—See CARRIERS—RAILWAYS; AND RAILWAY COMPANIES.
2. *Sale of Lands*—See SALE OF LANDS.
3. *Sale of Timber*—See TIMBER.
4. *Warranty*—See WARRANTY.
5. *Liquidated or Penal*—See PENALTY BY CONTRACT.

##### IV. ACTIONS FOR PERSONAL INJURIES.

1. *Libel and Slander*—See DEFAMATION.
2. *For Negligence*—See NEGLIGENCE.
3. *Seduction*—See SEDUCTION.

##### V. ACTIONS ON COVENANTS.

1. *For Title*—See COVENANTS FOR TITLE.
2. *In Leases*—See LANDLORD AND TENANT.

##### VI. INFRINGEMENT OF PATENTS—See PATENT OF INVENTION.

##### VII. NON-REPAIR OF HIGHWAY—See WAY.

##### VIII. EXCESSIVE DAMAGES—See NEW TRIAL.

##### I. GENERALLY.

The plaintiff, who was the surviving trustee under the will of J. B., of certain land on which was erected a two story brick house, the westerly wall of which formed the boundary of one L.'s land immediately adjoining the plaintiff's on the west. L. leased to F., who erected thereon a large brick building, using the plaintiff's westerly wall as a party wall, inserting joists therein and building thereon so as to raise it two stories higher, thereby weakening the plaintiff's wall. F. mortgaged to a building society who, in default, sold to the defendant:—Held, that the plaintiff was entitled to recover as damages the expense of removing such wall so erected on his wall, and the damages occasioned by his wall being weakened, but not damages

for the loss of a sale of the property by reason of the erection, *Brooke v. McLean*, 5 O. R. 209.—C. P. D.

Damages for sale of stock given in pledge before default of pledgor. See *Carnegie v. The Federal Bank*, 5 O. R. 418.

Defendant agreed to furnish plaintiff with money to construct a drain in the township of Dunwich, known as the Mennie drain the amount to be furnished "not to exceed the sum of \$1,500 at any time," and to pay the same to plaintiffs as often and in such sums as might be required, the plaintiff to give the defendant his note for each sum required, and to pay defendant interest at 12 per cent. per annum for the use of said moneys. Plaintiff alleged that upon the strength of this agreement he contracted with the township to construct the drain. Defendant furnished moneys from time to time to the plaintiff, exceeding in all \$1,500, but not sufficient to complete the drain, and defendant refused to furnish more. The plaintiff borrowed moneys from others at less than 12 per cent. interest, but claimed damages for alleged breach of his agreement contending that he was thereby delayed in completing the drain, and that owing to such delay and to the winter setting in he lost largely, instead of making a profit, which he would otherwise have made:—Held, that whether the agreement was to furnish money to the extent of \$1,500 only, or to such extent as might be necessary for the construction of the drain, not exceeding \$1,500 at any one time, the only damages for which defendant was liable would be the difference between the rate of interest payable to defendant under the agreement and the market rate of interest at the time of the breach. Per Armour, J.—Under the true construction of the agreement the defendant was bound to supply \$1,500 only. *Mennie v. Leitch*, 8 O. R. 397—Q. B. D.

Remarks upon the elements to be considered by the master in assessing damages to a municipal corporation upon failure of defendant in performance of contract to carry on manufactures according to the terms of a by-law granting him aid. See *Corporation of the Village of Brussels v. Roult*, 11 A. R. 605.

Measure of damages in an action of deceit on the part of the defendants, owners of a line of steamers, as to certain contracts alleged by them to be held in connection with their line of steamers, whereby the plaintiffs, owners of another line of steamers, alleged that they were induced to enter into an agreement with the defendants for the amalgamation of the two lines, and the formation in connection with the defendants of a joint stock company to own and run the same. See *Beatty et al. v. Neelon et al.*, 12 A. R. 50.

The plaintiff agreed to complete and set up by a certain day a steam engine and machinery in defendant's mill in which he had previously been using water power, but failed to complete it for some time afterwards. The master at Owen Sound, in estimating defendant's damages, allowed him, for loss of profits, in addition to rental of the mill and interest on the value of the machinery and of logs waiting to be sawed, \$118. On appeal from his report, Proudfoot, J., made an order declaring "that the true measure of damages the defendant is entitled to claim is the amount which would have been earned by the

mill in the ordinary course of employment," and referred it back to the master to review his report. On appeal therefrom to this court the judgment was reversed; the court being of opinion that the master had been sufficiently liberal in his allowance of damages to the defendant for breach of the contract; and that had any greater amount of damages been given it could have been allowed as speculative damages only. The right to recover for loss of profits discussed. *Corbet v. Johnson*, 10 O. R. 564.

Petition of right for damages for failure on the part of the Crown to perform agreement. See *Windsor and Annapolis R. W. Co. v. The Queen et al.*, 11 App. Cas. 335.

The measure of damages recoverable by tenant for life of insured premises is the full value of such premises to the extent of the sum insured. *Caldwell v. Stadacona Fire and Life Insurance Company*, 11 S. C. R. 212.

See *Star Kidney Pad Company et al. v. Greenwood*, 5 O. R. 28, p. 50; *Temple v. The Toronto Stock Exchange*, 8 O. R. 705, p. 117. See also *Peterborough Real Estate Investment Co. v. Ireton*, 5 O. R. 47; *Smith v. Goldie*, 11 P. R. 24.

## DEATH.

I. OF PARTNER—See PARTNERSHIP.

II. OF SURETY—See PRINCIPAL AND SURETY.

## DE BENE ESSE.

See EVIDENCE.

## DEBENTURES.

The C. P. & M. Railway company being authorized by 38 Vict. c. 47, (Ont.) to issue preferential debentures, the holders of which, it was enacted might, on default in payment, obtain a foreclosure or sale of the railway by suit in chancery, the directors passed a by-law enacting that such debentures should be issued, under the seal of the company, and should "be negotiated from time to time as the proceeds thereof shall be required for the purposes of the company by the managing director." Debentures were accordingly issued in blank, and handed to the managing director, who, subsequently, the railway being indebted to the plaintiff, delivered certain of them to the latter, as security for such debt. The debentures were in the following form:—

debenture No. \_\_\_\_\_  
The C. P. & M. Railway Company owes the bank of Toronto, or order, the sum of \$1,000 payable in ten years \* \* \* with interest at 8 per cent. per annum, payable half-yearly, on presentation of the proper coupons hereto attached. The name, "Bank of Toronto" was not filled in until about the time of delivery to the plaintiffs, who now brought this action for an account of what was due under the debentures and payment, or, in default, a sale by the court of the property of the company:—Held, that the debentures were valid, and judgment must go as asked. The strict rules of the common law re-

lating to deeds, but not relating to mortgages, were not so, Toronto, was plaintiffs did would come deeds have alteration of the time of execution could not be filled up a was no execut to the time wh also, that, the seal, this d which was rat of mortgages; charge on all t a right of forc thing superind of the statute pany having is handed them t also secretary a him at his disc plete them by t and the compan ing on such defe that inasmuch tures were deliv company's oper ing of ore, the was a "negotiat rrying on the. in the meaning Bank of Toronto ora Railway C

See also *Corporation of the City of Quebec Central Railway Co.*

See FRAUD.

DECLARATION.

OF.

See *Van Koughen v. Yarrow*, 156; *Kennedy v. City of Toronto*.

I. CONSTRUCTION.

1. Description.
2. Condition.
3. Habendum.
4. Estate created.



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lating to deeds are not applicable to such debentures, but rather the rules of the law merchant relating to negotiable securities. But if this were not so, the fact that the name, bank of Toronto, was not filled in until delivery to the plaintiffs did not make the debentures void; it would come within that class of cases where deeds have been held good, notwithstanding an alteration or subsequent addition, because, at the time of execution, there was something which could not be ascertained, and was therefore to be filled up afterwards. Here, however, there was no execution, which imports delivery, prior to the time when the name was filled in:—Held, also, that, though the debentures were under seal, this did not detract from their character, which was rather that of promissory notes than of mortgages; and though the Act made them a charge on all the property of the company, with a right of foreclosure and sale, this was something superinduced upon the security by virtue of the statute:—Held, further, that the company having issued the debentures in blank and handed them to the managing director, who was also secretary and treasurer, to be dealt with by him at his discretion, he was empowered to complete them by the insertion of the obligee's name, and the company would be estopped from relying on such defences as the above:—Held, lastly, that inasmuch as it appeared that these debentures were delivered with a view to facilitate the company's operations in getting out and disposing of ore, the main branch of its business, this was a "negotiation" of them "for the purposes of carrying on the company's business," and so within the meaning of the aforesaid Act and by-law. *Bank of Toronto v. Coboury Peterborough, and Mar-  
bora Railway Company et al.*, 7 O. R. 1.—Boyd.

See also *Corporation of the City of Quebec v. Quebec Central R. W. Co.*, 10 S. C. R. 563.

## DECEIT.

See FRAUD AND MISREPRESENTATION.

## DECLARATORY JUDGMENT

See JUDGMENT.

## DEDICATION.

OF ROADS—See WAY.

See *VanKoughnet v. Denison*, 11 O. R. 699, 156; *Kennedy et al. v. The Corporation of the City of Toronto et al.*, 12 O. R. 211, p. 182.

## DEED.

### I. CONSTRUCTION AND OPERATION.

1. *Description of Land*, 178.
2. *Conditions and Reservations*, 180.
3. *Habendum*, 182.
4. *Estate Created*—See ESTATE.

5. *Deeds under the Short Forms Acts*, 182.
6. *Covenants in*—See COVENANT—COVENANTS FOR TITLE.

7. *Evidence to Explain*—See EVIDENCE.

### II. RECTIFYING AND VARYING.

1. *Generally*, 182.
2. *Parol Evidence to Vary*—See EVIDENCE.

### III. SETTING ASIDE.

1. *Generally*, 183.
2. *Fraud*—See FRAUD AND MISREPRESENTATION—FRAUDULENT CONVEYANCES.
3. *Cloud on Title*—See SALE OF LANDS.

### IV. REGISTRY OF—See REGISTRY LAWS.

### V. ESTOPPEL BY DEED—See ESTOPPEL.

### VI. PARTICULAR DEEDS—See THE SEVERAL TITLES.

### I. CONSTRUCTION AND OPERATION.

#### 1. *Description of Land.*

In 1851, J. purchased the whole of lot 20 from the Crown, the lot nominally containing 200 acres, and described in the Crown Lands Department books as containing 175 acres, more or less. On 30th October, 1852, before taking out his patent, J. sold and assigned, by a written assignment to R., the east half or part of the lot described as seventy-five acres, "neither more or less." In 1863, R. sold to B. his interest in this parcel, described as containing "seventy-five acres, more or less," and as being composed of the east part of the lot. On 22nd July, 1883, B. took out a patent of his portion, the land being described as "seventy-five acres, more or less," being all the lot except the west 100 acres. On 28th August, 1868, J., who retained all he had not sold to R., took out a patent himself, the land being described as the west 100 acres, without the words more or less, these words having been erased from the printed form on which the patent was written. Subsequently B. reconveyed to R., through whom the plaintiff claimed as heir of his father, and as having acquired the title of the other heirs. J., after obtaining his patent, conveyed the northerly and southerly portions to his two sons, the defendants. About the time J. took out his patent, by instructions from the plaintiff's father, a surveyor ran a line dividing the seventy-five acres from the 100 acres; and in 1874, he procured another line to be run under instructions to lay off the seventy-five acres, which was done, and the plaintiff's father and J. jointly erected a fence on such line. In 1883, the plaintiff discovered that the actual acreage exceeded 175 acres by some eleven acres. The actual occupation under B.'s patent was confined to the seventy-five acres:—Held, that B.'s patent would of itself include the eleven acres; and there was nothing to show that the patent was issued by fraud or mistake so as to entitle defendants to have it reformed; and that defendants on the evidence, except as to a small portion thereof, failed to shew any possessory title to the land in question. *Cain v. Junkin et al.*, 6 O. R. 532—C. P. D. Affirmed in appeal, 13 A. R. 525.

Per Strong, J., where lands are described by reference to a plan, the plan is considered as in-

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incorporated with the deed, and the boundaries of the lands conveyed as defined by the plan are to be taken as part of the description. In construing a deed of land not subject to special statutory regulations, extrinsic evidence of monuments and actual boundary marks is inadmissible to control the deed, but if reference is made by the deed to such monuments and boundaries, they control, though they may call for courses, distances, or computed contents which do not agree with those in the deed. *Grasett v. Carter*, 10 S. C. R. 105.

When a close or parcel of land is granted by a specific name, and it can be shewn what are the boundaries of such close or parcel, the governing part of the description is the specific name, and the whole parcel will pass, even though to the general description there is superadded a particular description by metes and bounds, or by a plan which does not shew the whole contents of the land as included in the designation by which it is known. *Attrill v. Platt*, 10 S. C. R. 425.

In 1859, the then owners of part of the lands in question had a plan prepared and registered, and in 1871, they conveyed a parcel which they described as block F:—Held, that it must be presumed they intended to convey the same parcel of land shewn on said plan as block F with the same natural boundaries as those indicated thereon. *Ib.*

Held, that though a plan not certified as required by the registry law, R. S. O. c. 111, s. 82, subs. 2, had, although deposited in the registry office, no effect under the registry law, yet in a deed reference might be made to it, as it might to any other document in the registry office or elsewhere, for the description or designation of a lot. *Ferguson v. Windsor*, 10 O. R. 13.—O'Connor.

A patent from the Crown purported to grant the W.  $\frac{1}{4}$  of a certain lot of land, through which flowed the F. river, issuing out of the C. lake in the N. W. corner of the half lot, and running across the half lot in a diagonal direction. In the metes and bounds given in the patent occurred the following courses: "Then S. 73 degrees 15 minutes W. 24 chains, more or less, to C. lake; thence southerly, along the water's edge, to the allowance for the road between the 9th and 10th concessions; thence S. 16 degrees 45 minutes E. 21 chains, more or less, to the place of beginning: containing 76 acres, more or less, together with the waters thereon lying and being." From the point thus indicated on the margin of the C. lake, which was about the place of issuance of the F. river from it, a shoal, a good part of which was exposed, extended across in a southerly direction to the road between the 9th and 10th concessions. It was contended that the said metes and bounds indicated that a course was to be taken from the said point on the margin of the C. lake along the E. bank of the river to the imaginary eastern line of the half lot, then across the river, and up the other side to the said road, and that this interpretation coincided with the acreage mentioned in the patent, and that none of the land covered by the F. river passed to the grantee:—Held, however, that the plan and description of the lot, together with the other circumstances of the case, showed that by the "water's edge" was meant the edge of the lake, i. e., the shoal above mentioned, which was to be taken as the margin of the lake, and the

course indicated was across the lake on the line of the said shoal, so that the bed of the river crossing the half lot passed to the grantee, notwithstanding that by this interpretation about fourteen acres above the quantity mentioned in the patent passed thereby. There being a reasonably accurate particularization of the four boundaries, the quantity of acres must not be regarded as the controlling term of the description. The fair presumption was that such a course was meant as would give the most direct points of connection between the termini thereof. *Re Trent Valley Canal and Lands Expropriated at Fenelon Falls*, 12 O. R. 153.—Boyd.

Where a river flowed diagonally through a certain lot of land, and the owner of the lot granted the part thereof lying N. or E. of the said river to one party, and the part lying S. or W. of the said river to the other party:—Held, that this would carry the ownership of the soil to the mid thread of the river to the respective parties, no evidence of intention inconsistent therewith appearing upon the instrument. *Ib.*

In an action of ejectment the question was as to the position of lot 5 in the 18th concession, the plaintiff's lot, which was granted in 1807, and lot 24 in the 17th concession, the defendant's lot, the patent for which was issued at a later date. No traces remained of the surveyor's work on the ground. In the former patent the concession line was given as the southerly boundary of the lot, with a distance of 84 chains more or less from thence to the river:—Held, in this reversing the judgment of Ferguson, J., reported (2 O. R. 614), that notwithstanding there was no evidence of the actual position of the line as run upon the ground, and that all the land in both concessions at the date of the patent belonged to the Crown, the distance of 84 chains thus given could not be treated as fixing the position of the concession line as at an absolute distance of 84 chains at least from the river. *Plumb v. Steinhoff*, 11 A. R. 788.

See *Ferguson v. Windsor*, 11 O. R. 88, p. 183; *Grasett v. Carter*, 10 S. C. R. 105, pp. 65, 66.

## 2. Conditions and Reservations.

W. H. conveyed his farm to his son, and took back from him a mortgage on it, with a proviso for redemption on payment of \$4,000, without interest, in manner following: to pay W. H. and A. H. his wife, during their joint lives, \$300 a year, and to continue to make the said payments to the survivor during his or her life; and one year after the death of both to pay his brothers and sisters \$300 each at the times therein mentioned, which words were inserted in writing, the rest of the instrument being in print. W. H. and A. H. died, and their administratrix brought this action to recover arrears, R. H. contending that in any event he was not to pay more than \$4,000, which he had fully paid:—Held, that it being impossible to give literal effect to all the parts of the mortgage, the defeazance clause upon payment of \$4,000, without interest, being quite irreconcilable with the particulars regarding the payments, the court must regard the general scope and intent of the deed, and that evidently being to arrange the terms of an annuity for the joint lives of the father and mother,

and of the son, construed, and the deed in his favor in any event. *v. Mill et al.*,

On September bargained and sold of D. district a certain lot for a school-house. Habendum, for municipal corporation subject to a provision within one year for the use of the soil should at the will of the school save said school should sell, less said land, it should be the will of B. and his heirs of the said municipality will, dated July estate to certain without having The municipal corporation by building of the making been broken, dealt with the land by the deed land having been have it declared will of J. Le B. to the proceeds "possibility" if a "right of election" in sec. 1, latter phrase; of a devise, and of "land." A condition no more require words as to be found in the verter was a condition the testator who subsequent breach by entry by which be converted into also, that a "condition strictly so "conditional line estate or interest and determined its room; and therefore perfected the heirs of J. I. titled to the land. *In re Melville*, 1

Certain ordinance was, in 1858, passed by the city of T., with the patent: "Provided subject to the (the land) \* \* \* corporation, and the purpose of a public recreation of the T., for all time the ratification of T., in the Legislature an Act sell, or otherwise one of their com

and of the survivor, the deed must be so construed, and that R. H., therefore, could not succeed in his present contention, that he was not in any event to pay more than \$4,000. *Coleman v. Hill et al.*, 10 O. R. 172.—Boyd.

On September 26th, 1844, J. Le B. by deed bargained and sold, &c., to the municipal council of D. district, in consideration of five shillings, a certain lot for the purpose of erecting thereon a school-house for the use of the D. district. Habendum, for the purpose aforesaid, unto the municipal council forever. The deed was subject to a proviso that the said council should within one year from its date erect a school-house for the use of the said district, or if the said council should at any time erect any other building save said school-house and necessary offices, or should sell, lease, alien, transfer, or convey the said land, it should be lawful for the said J. Le B. and his heirs to re-enter and avoid the estate of the said municipal council. J. Le B. by his will, dated July 23rd, 1847, devised all his real estate to certain nieces, and died in the year 1848, without having revoked or altered said will. The municipal council complied with the condition by building a school-house, and at the time of the making of the will, the condition had not been broken, but the successors of D. district dealt with the land otherwise than was authorized by the deed, and broke the condition. The land having been sold, a petition was filed to have it declared whether the devisees under the will of J. Le B. or his heirs-at-law were entitled to the proceeds thereof:—Held, that the word "possibility" in R. S. O. ch. 106, sec. 2, includes a "right of entry for condition broken," mentioned in sec. 10, and is more extensive than the latter phrase; and might therefore be a subject of a devise, and is covered by the general name of "land." And that upon the breach of the condition no new estate was acquired, so as to require words applicable to after acquired estates to be found in the will. The possibility of reverter was a contingent interest that existed in the testator when the will was made, and the subsequent breach of the condition gave a right by entry by which the contingent interest might be converted into an estate in possession:—Held, also, that a "condition of re-entry," or condition strictly so called, as distinguished from a "conditional limitation," is a means by which an estate or interest is to be prematurely defeated and determined, and no other estate created in its room; and that the condition in this case was therefore perfectly valid. The devisees and not the heirs of J. Le B. were consequently held entitled to the land or the money representing it. *In re Melville*, 11 O. R. 626.—Proudfoot.

Certain ordinance land vested in the Crown was, in 1858, patented to the corporation of the city of T., with the following clause in the patent: "Provided always, and this grant is subject to the following conditions, viz., that (the land) \* \* shall be dedicated by the said corporation, and by them maintained for the purpose of a public park for the use, benefit, and recreation of the inhabitants of the said city of T., for all time to come" \* \* . The corporation of T., in 1876, obtained from the Ontario Legislature an Act empowering them "to lease, sell, or otherwise dispose of" the said land, and one of their committees transferred it to another

to use as a cattle market, receiving a yearly rent therefor which they applied to a park fund as provided by the Act giving the power to sell, &c. In an action by a ratepayer to prevent the land being used as a cattle market, and more money being spent on it for that purpose, in which it was contended that the land was granted upon a condition under which the Crown might retake it, and that the Act of the Provincial Legislature was ultra vires in dealing with it. It was:—Held, on demurrer, that the words in the patent "Provided always and this grant is subject to the following conditions," did not create a condition annexed to the estate granted, but a trust was created the same as if the words used had been "upon the following trusts," and that by the grant the grantors parted with all their estate and interest:—Held, also, that the words "otherwise dispose of," when read with the rest of the Act covered the mode of using the property adopted, viz., as a cattle market, and the demurrer was allowed, with costs. *Kennedy et al. v. The Corporation of the City of Toronto et al.*, 12 O. R. 211.—Ferguson.

In an action of trespass q. c. f. the defendants justified under a reservation or exception in a deed through which the plaintiff claimed title and in which the description of property was followed by the words, "excepting and reserving a right of way or road allowance of two rods in width along the south side of said lot:"—Held, that this was only a reservation of a right of way to the grantor and not an exception of the soil. *Wright v. Jackson et al.*, 10 O. R. 470—Q. B. D.

### 3. Habendum.

*Sec Dunlap v. Dunlap*, 6 O. R. 141 p. 212.

### 5. Deeds under the Short Forms Acts.

M. gave a mortgage to T. on certain lands. The mortgage was in the statutory short form, except that immediately after the printed covenant for payment the following words were inserted in writing: "It being understood, however, that the said lands only shall in any event be liable for the payment of the mortgage." The distress clause remained unaltered in its usual place, viz., after the covenants. T. assigned the mortgage to H., who, on an instalment of interest falling due, distrained for it. M. now brought this action for a wrongful distress:—Held, that M. was entitled to recover the amount distrained for with interest and costs, for the earlier provision controlled the subsequent one, both because it was first in the deed, and because it was in writing, and the words superadded in writing were entitled to have greater effect attributed to them than the printed clauses. *McKay et al. v. Howard*, 6 O. R. 135.—Boyd.

See also *Mangan v. Casci*, 5 O. R. 518.

## II. RECTIFYING AND VARYING.

### 1. Generally.

Held, on the evidence in this case, that the deed did not express the true agreement of the parties, and could not be allowed to stand; but

D. having acted on the faith of the arrangement for some years, and being willing to carry out the original bargain, and execute proper instruments, the deed should not be set aside, but should be reformed. The danger of employing unlearned conveyancers commented on, and the expediency of throwing safeguards round the practice of conveyancing pointed out. *Dunlap v. Dunlap*, 6 O. R. 141.—Boyd. Reversed on appeal, 10 A. R. 670.

Rectifying deed executed mainly to protect property from an anticipated action for breach of contract. See *Mundell v. Tinkis et al.*, 6 O. R. 625.

The judgment of O'Connor, J. 10 O. R. 13, reversed. Per Boyd, C. The evidence in this case does not come up to the standard laid down in *Dominion Loan Society v. Darling*, 5 A. R. 577, by Moss, C. J., that "It must be demonstrated what the true terms of the bargain were, and that by mutual mistake they were not incorporated in the writing. The proof must be clear, satisfactory, and conclusive." The defendant bought lot 7, as contained in S.'s mortgage, and obtained a deed from the executors according to a registered plan which is to be treated as incorporated therewith and he is, even as against his representation to the plaintiff that the piece in dispute was a portion of the property she was in treaty for and subsequently purchased, entitled to claim the benefit of G.'s position as purchaser and registered owner for value. Per Proudfoot, J.—Even if the representation were proved the plaintiff owned no property at the time it was made to be affected by it, and such an expression of opinion should not estop him from purchasing lot 7 eighteen months afterwards. The purchasers at the auction sale got a better bargain than they thought they had made, but they had no knowledge of any right to be interfered with had they chosen to assert their title to the whole lot. This raises no equity against them in the plaintiff's favour. Even if the defendant had notice of the plaintiff's equity he is entitled to claim the benefit of the want of notice to the purchasers at the auction sale. *Ferguson v. Winsor*, 11 O. R. 88—Chy. D.

See also *Bridges v. The Real Estate Loan and Debenture Co.*, 8 O. R. 493.

### III. SETTING ASIDE.

#### 1. Generally.

The nullity of a deed should not be pronounced without putting all the parties to it en cause en déclaration de jugement commun. *Burland v. Moffatt*, 11 S. C. R. 76.

## DEFAMATION.

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#### 6. New trial.—See NEW TRIAL.

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#### I. PRIVILEGED COMMUNICATIONS.

The plaintiff, a school trustee, with another trustee, under the authority of the school board, purchased a quantity of firewood for use in the school house. In December, shortly before the municipal and school trustee elections, the defendant and H., another school trustee, were discussing the taxes, when defendant said that the trustees had paid too much for the wood: that plaintiff had culled it, and sold the best of it, and had drawn the culled wood to the school house: and, on H. remonstrating with him, said: "Oh, but he did, and I can prove it:" that he could prove it by a person named N. Subsequently in the same month, a discussion took place between defendant and B., first as to council, and then as to school matters, when defendant related the conversation he had had with N. in which he had said to N. that the wood was dear, and that N. had said that it was No. 2 at that: that there was something strange about the wood, and it must have been culled, for they bought No. 1, and drew No. 2 to the school house. In an action for slander:—Held, Rose, J., dissenting, that the words having been spoken by a person interested to another, also interested, the occasion was privileged; and in the absence of proof of express malice no action would lie. *Blagden v. Bennett*, 9 O. R. 593—C. P. D.

Quere, whether defamatory words spoken of a person holding an elective office with regard thereto, not followed by special damage, are actionable when they would not be so when spoken of the holder in his private capacity. *Ib.*

Held, that the omission to plead privilege as a defence did not preclude the defendant from setting it up at the trial. *Ib.*

In an action of libel paragraphs 3 and 4 of the defence set up that the alleged libel was published on a privileged occasion; the ground of privilege being that it was a fair and bona fide comment upon a matter of public and general interest, which had become such by means of the plaintiff's own appeal to the public through the medium of the press, inviting public attention to his professional character and position, and challenging public criticism upon his conduct in connection with all the matters referred to in the alleged libel, which was printed and published by the defendant bona fide, for the public benefit, and without malice:—Held, affirming the judgment of Rose, J., 8 O. R. 53, a good defence. *Farmer v. The Hamilton Tribune Co.*, 3 O. R. 538, and *Murphy v. Halpin*, Ir. R. 8 C. L. 127, distinguished. *Macdonell v. Robinson*, 12 A. R. 270.

The defendants and others signed a petition to the license commissioners of the city of Hamilton, praying that a license might not be granted

to the plaintiff, one of the words that it was kept no suitable as lord was very that the occasion of the petition of the plaintiff but that the defendant express malice occasion for so jury gave a verdict, and the court he a new trial case was tried 5 O. R. 360—

The defendant plaintiff, a business called "Legal" meaning mortgage on the assigned one he libellous, and *McLain*, 10 O.

In an action of the very defendants' new as warden of defendants refused the letters, and The learned judge has a right to interest and generally and with comments are their terms unlibel and malicious plaintiff with libel was not privileged occasion: to the judge's of the libel was a matter in which the *v. The Toronto C. P. D.*

In an action of defendants D. W. cantile agency, requesting him to the plaintiff's credit, stating premises had been from \$1,200 to \$8 full particulars, something wrong. The made enquiry and is that he was been done he has he was robbed, \$200; circumstances not say." The subsequently issued a sheet, on which, the words: "If This was published defendants' custody the United States of whom had any The circular also words "If interest imply that the imple. On the con

to the plaintiff, and stating that his tavern was one of the worst drinking holes in the country: that it was kept very disorderly; that there was no suitable accommodation, and that the landlord was very much given to drinking:—Held, that the occasion of the presentation or publication of the petition was not absolutely privileged, but that the onus lay upon the plaintiff to prove express malice, and that the defendants used the occasion for some indirect or wrong motive. The jury gave a verdict for the plaintiff for \$1,000, and the court was of opinion on the evidence, verdict, and general merits, that there should be a new trial, Cameron, J., before whom the case was tried, dissenting. *Wilcocks v. Howell*, 5 O. R. 360—Q. B. D.

The defendant published of and concerning the plaintiff, a business man, in a written circular, called "Legal Record Co., Renfrew," a statement meaning that plaintiff had given a chattel mortgage on his property, whereas he had only assigned one held by him against another:—Held, libellous, and not privileged. *Lemay v. Chamberlain*, 10 O. R. 638—Q. B. D.

In an action of libel the libel consisted of letters of a very gross character published in the defendants' newspaper reflecting on the plaintiff as warden of the Central Prison. The defendants refused to give the name of the writer of the letters, and assumed responsibility therefor. The learned judge told the jury that "every one has a right to comment on matters of public interest and general concern, provided he does so fairly and with an honest purpose." Such comments are not libellous however severe in their terms unless they are written intemperately and maliciously." The jury found for the plaintiff with \$8,000 damages:—Held, that the libel was not privileged or published on a privileged occasion: that no exception could be taken to the judge's charge: nor could it be said that the libel was a fair comment upon a public matter in which the public had an interest. *Muskie v. The Toronto Printing Company*, 11 O. R. 362—C. P. D.

In an action of libel it appeared that the defendants D. W. & Co., the proprietors of a mercantile agency, wrote to the defendant C. requesting him to advise them confidentially of the plaintiff's standing and responsibility for credit, stating that plaintiff "claimed that his premises had been burglarized;" that he had lost from \$1,200 to \$1,600, asking if this were so, for full particulars, and whether there was not something wrong. The defendant C. replied: "I have made enquiry and find that the general opinion is that he was not robbed at all, and what has been done he has done himself: at all events, if he was robbed, it is of not more than \$100 or \$200; circumstances are against him; still I cannot say." The defendants D. W. & Co., subsequently issued a printed circular or notification sheet, on which, after the plaintiff's name, were the words: "If interested, enquire at office." This was published and circulated amongst the defendants' customers, some 800, in Canada and the United States, not more than three or four of whom had any interest in the plaintiff's affairs. The circular also contained the following: "The words 'If interested enquire at the office,' do not imply that the information we have is unfavourable. On the contrary, it may not unfrequently

happen that our last report is of a favourable character; but subscribers are referred to our office because in justice to them, the parties reported, and to ourselves, the information can only be properly conveyed to those entitled to receive it by the full report, as we have it on our records." It was proved that the words: "If interested," &c., had the effect of injuring the plaintiff. No attempt was made by C. to prove that the statements made in his letter were true, or that he had made enquiry and found the general opinion to be as stated. The jury found for the plaintiff:—Held, that the words charged were clearly libellous, and there was no privilege; for as to D. W. & Co., the court was governed by *Lemay v. Chamberlain*, 10 O. R. 638, it being proved that the notification sheet was sent to all subscribers whether interested in the plaintiff's affairs or not; and the explanatory statement did not affect the matter: and as to C. his failure to prove the truth of his statements, or his belief in their truth, deprived him of any privilege. *Todd v. Dunn, Wiman & Co., et al.*, 12 O. R. 719—C. P. D.

See *McCum v. Preneveau*, 10 O. R. 573, p. 190.

## II. AFFECTING PERSONS IN OFFICE, TRADE, OR BUSINESS.

S. et al., (respondents) partners in trade, sued the D. T. Co. (appellants) for defamation of the respondents in their trade. In the declaration it was alleged:—1. That they were wholesale and retail merchants at Halifax. That appellants wrongfully, falsely and maliciously, by means of their telegraph lines, transmitted, sent and published from their office at Halifax to their office in St. John, and there caused to be printed, copied, circulated and published the false and defamatory message following:—"John Silver & Co., wholesale clothiers, of Grenville street, have failed; liabilities heavy." 2. That same message was caused also to be published in other parts of the Dominion. 3. That the appellants promised and agreed with the proprietor or publisher of the St. John Daily Telegraph newspaper, and entered into an arrangement with him, whereby the appellants agreed to collect and transmit, by means of their telegraph lines, news despatches to said newspaper from time to time, and that such publisher should pay for all such messages and should publish them in his newspaper, and that in pursuance of said agreement the appellants wrongfully, maliciously and by means of said telegraph, transmitted, sent and published from their office in Halifax to their office in St. John, and there falsely and maliciously caused to be written, printed, copied, circulated and published the above message, whereby many customers who had heretofore dealt with plaintiffs ceased to do so, and their credit and business standing and reputation were thereby greatly damaged. The D. T. Co. denied the several publications charged, and also the entering into this agreement mentioned in the third count and the forwarding of the messages as alleged. At the trial it was proved that the telegram which was published in the morning paper was corrected in the evening edition, and that the publisher's agreement was with one Snyder, an officer of the company, to furnish him news at so much for every hundred words, but that he

only paid for such as he used. The original despatch was not produced. The only evidence as to damages was the evidence of two witnesses, who proved that by reason of the publication they ceased to do business with the respondents as they had previously been accustomed to do. This evidence was objected to as inadmissible, but was received. The dealings of these witnesses with the plaintiffs consisted in selling their exchange and sometimes discounting their notes. The counsel for the defendants moved for a non-suit which was refused and the case was submitted to the jury who, upon the evidence, rendered a verdict for the plaintiffs with \$7,000 damages. On appeal to the Supreme Court of Canada, it was:—Held, (Taschereau and Gwynne JJ., dissenting,) that the appellants, the D. T. Co., were responsible for the publication of the libel in question. Per Taschereau and Gwynne JJ., dissenting, assuming the agreement in question to be one within the scope of the purposes for which the defendants were incorporated, and that Snyder had sufficient authority to enter into it on behalf of the defendant company, the evidence established that the defendants collected, compiled and transmitted the news for the proprietor of the newspaper, as his confidential agents and at his request, and that they were not responsible for the publication by the said proprietor and publisher of said news, for which the damages were awarded. 2. Sir W. Ritchie, C.J., doubting, and Henry, J., dissenting, that the damages were excessive, and therefore a new trial ought to be granted:—Held, also, per Strong, Taschereau and Gwynne, JJ. No special damages having been alleged in the declaration, the evidence as to such damages, having been objected to, was inadmissible, and therefore a new trial should be granted. *Dominion Telegraph Company v. Silver*, 10 S. C. R. 238.

See *Huber v. Crookall*, 10 O. R. 475, p. 189; *Livingston v. Trout*, 9 O. R. 488, p. 188; *Scott v. Creerar*, 11 O. R. 541, p. 191.

(See also the preceding Sub-head.)

### III. ACTIONS FOR.

#### 1. Pleading.

The statement of claim in an action of libel brought by plaintiff, an insurance inspector and adjuster and at the time of action brought the liquidator of an insurance company, alleged that defendant in an article published in his newspaper commenting on the trial of a previous action of libel brought by plaintiff against defendant in which plaintiff had recovered one shilling damages, stated that he would not have been surprised if the jury had found more favourably for plaintiff, for though evidence of general reputation was admitted, the court had refused to allow evidence of specific acts of improper conduct, unless directly connected with the insurance company; and that in further commenting on said trial in his said article falsely and maliciously published of the plaintiff, in his business as an insurance adjuster, that plaintiff would have been asked to explain the purchase of a claim in respect of a loss, one half of the amount of which he afterwards received from the company while their adjuster; and as to gifts re-

ceived from persons whose losses he had adjusted; the innuendo alleged being that plaintiff had been dishonest in adjusting claims and had accepted bribes, &c.; and that the article was an unfair and false report of the trial. The defendant by his statement of defence admitted the publication of the article, but denied the innuendo, and also any malice, &c.; and alleged that there was an inaccuracy in the article as to the question which might have been asked plaintiff by which a wrong impression might have been conveyed which was corrected at the earliest opportunity in defendant's newspaper by an article stating that the question referred to should have been that the purchase was made in respect of a loss which occurred while the company's adjuster, but that the payment was after he had left the company:—Held, on demurrer, that the difference between the first and second articles as to the payment on the alleged purchase was material, for if it was proved that the first article was in this respect false to the knowledge of the defendant, and he made no correction, this would be evidence of malice, and would probably materially affect the damages; but even if immaterial the plaintiff was not prejudiced: that it was only offered as a defence to a portion of the damages. The demurrer was therefore overruled. *Livingston v. Trout*, 9 O. R. 488.—Rose.

To an action of slander the defendant set up as a defence facts which amounted to a justification, but restricted their effect to the mitigation of the damages:—Held, this constituted a good defence. *Wilson v. Woods*, 9 O. R. 687.—Rose.

In libel a plea in mitigation of damages must in its nature be an admission that the plaintiff is entitled to recover some compensation; but it amounts to a contention that the amount of the plaintiff's recovery shall be limited to the value of the plaintiff's character, which value is affected by the facts pleaded. Such a plea, based upon the plaintiff's bad character, must either shew that the plaintiff is a man of bad general reputation or character, or that the plaintiff has a bad character with regard to some specific act which relates to the charge in the libel complained of. *Moore v. Mitchell*, 11 O. R. 21—Q. B. D.

It is not permissible to a defendant to plead justification to a libel, and under that defence to offer evidence of the plaintiff's bad character in mitigation of damages: *Wilson v. Woods*, 9 O. R. 687, disapproved of. *Id.*

A draft drawn on the plaintiff being presented for acceptance at his place of business by a clerk in an agency of a bank, answer was returned that the drawee (plaintiff) was away from home, in the Western States, and the clerk so noted the answer on the back of the draft. The defendant, the manager of the bank agency, added in his own handwriting to what the clerk had written the words, "or San Francisco, or the Rocky Mountains," and the draft was thereupon returned to another bank, by which it had been sent for presentation, and by which after its return it was handed to the bankers of the drawers. Innuendo, "that the defendant meant to impute that the plaintiff had left for parts unknown, not intending to return to Ontario, and with intent to defraud" his creditors:—Held, that the words were capable of the libellous meaning alleged, and a nonsuit was therefore set

aside and a nonsuit granted. The plaintiff admitted to the jury that in fact he had set out to go to the trial. At the trial the evidence was returned, and the plaintiff stood by the evidence. This question was ruled that in the evidence was admitted, and the plaintiff's usage of bank was meaning other than their natural meaning. The plaintiff put:—Held, not in any way affecting such words, but following nevertheless a libel for the first time have been instances which words in other upon proof of would have been judge's ruling set from laying ordered. *Huber*

Counter claim for negligence. *Railway Co., v. I.*

Amendment. *Preneveau, 10*

See *Blagden*

Particulars struck out as too general, the discretion of the court thereunder. *Chubbell*, 10 P. R. 1

An order for of claim in an action of the persons to spoken, was res of the plaintiff recovery that he particulars:—S practice laid d P. R. 535, as should be following in England. —Boyd.

(a) Examination

In an action for defendants, on Act, were allowed strictions, the p v. *The Globe P. ton, Master,*

The plaintiff's agent, and on 1

adjustment had been made as to the damages. *Lieuwig v. Huber*, 10 O. R. 475—Q. B. D.

aside and a new trial directed, in order to submit to the jury the question whether the words did in fact bear that meaning:—Held, also, on the facts set out in the report, that there was evidence to go to the jury in support of the innuendo. At the trial the bank manager to whom the draft was returned was asked, "What do you understand by the words added by defendant?" To this question objection was taken, and the judge ruled that in the absence of evidence (which it was admitted could not be given), that by the usage of bankers the words complained of had a meaning other than that conveyed by them in their natural construction, the question could not be put:—Held, that the usage of bankers could not in any way be the rule by which the meaning of such words could be held to be governed, but (following *Daines v. Hartley*, 3 Ex. 200) that nevertheless a proper foundation had not been laid for the question; that the witness should first have been asked if there were any circumstances which would lead him to understand the words in other than their natural sense, and that upon proof of such circumstances the question would have been allowable. As, however, the judge's ruling had precluded the plaintiff's counsel from laying such a foundation, a new trial was ordered. *Huber v. Crookall*, 10 O. R. 475—Q. B. D.

Counter claim for libel excluded in an action for negligence. See *McLean v. Hamilton Street Railway Co.*, 11 P. R. 193.

Amendment of pleadings. See *McCann v. Preneveau*, 10 O. R. 573, p. 190.

See *Blagden v. Bennett*, 9 O. R. 593, p. 184.

## 2. Particulars.

Particulars in an action for libel cannot be struck out as insufficient; if those delivered are too general, the judge at the trial will exercise his discretion as to the admission of evidence thereunder. *Citizens Insurance Company v. Campbell*, 10 P. R. 129.—Dalton, Master—Cameron.

An order for particulars, under the statement of claim in an action of slander, of the names of the persons to whom the alleged slander was spoken, was rescinded because the examination of the plaintiff gave to the defendant all the discovery that he sought to obtain by the order for particulars:—Semble, in actions of slander the practice laid down in *Thornton v. Capstock*, 9 P. R. 535, as to particulars to be furnished should be followed in preference to that prevailing in England. *Gould v. Beattie*, 11 P. R. 329.—Boyd.

## 3. Evidence.

### a) Examination of Plaintiff before Defence Filed.

In an action for libel against a newspaper, the defendants, on a motion under Rule 285, O. J. Act, were allowed to examine, with certain restrictions, the plaintiff before defence filed. *Tate v. The Globe Printing Co.*, 11 P. R. 253.—Dalton, Master.

### (b) Of Publication.

The plaintiff had been a servant of the defendant, and on leaving the defendant's service,

asked for a statement of account, whereupon the defendant made out an account as follows: "Mr. Joseph Jackson to Wm. Staley, Dr." Amongst the items were the following: "Stole hay during winter, \$4.00," and "stole hatchet-hammer, \$1.50." The account was placed in an unsealed envelope and handed to M., the plaintiff's then employer who took it to the plaintiff's house and put it on the table between the plaintiff and his wife while at supper. The wife took up the envelope and taking out the account read it to the plaintiff who could neither read nor write. There was no evidence to show that the defendant knew that the plaintiff could not read, the only knowledge that defendant could have had being that the wife had signed plaintiff's contract with defendant, but it did not appear that the defendant's attention was called to this fact or that he knew that the signature was not the plaintiff's own hand writing; nor was there any evidence that M. read the account or took it out of the envelope, and he was not called as a witness. In an action of libel on the account, it was:—Held, that there was no evidence of publication; and as the onus of proof thereof was on the plaintiff, the action failed. *Jackson v. Staley*, 9 O. R. 334—C. P. D.

### (c) Other Cases.

In an action for malicious prosecution and slander:—Held, that evidence of the motives which induced the defendant to lay the charge before the magistrate was properly receivable, and should not have been rejected as was done here. There was no evidence to sustain the slander laid; but an amendment was allowed, to comply, as was alleged, with the evidence. The only objection made at the trial by the defendant was that he should be allowed to examine witnesses on the new count, which was done. An objection to the amendment in term was therefore not allowed. The evidence in support of the amended count consisted not of statements made voluntarily by the defendant, but of answers to questions put to him, after he had laid a charge against the plaintiff, as to the nature of it:—Held, that this was not sufficient to sustain an action of slander; and that words so spoken were privileged. *McCann v. Preneveau*, 10 O. R. 573—C. P. D.

Action for libel contained in anonymous circulars written on a type writer imputing unprofessional conduct to the plaintiff in sending "bummers" round "touting" for business, and in inducing other solicitors' clients to leave them and employ plaintiff's firm. The evidence, which was circumstantial, was that on the 13th October, P., M. and McK., members of the legal profession in Hamilton, received through the post the above circulars all of the same import though not copies, marked with the 2 p. m. post mark, and must have been posted between 2 and 3 p. m., as the practice was to change the post mark as the hour struck. The defendant and a firm of C. & W. had their office in the same building, the latter having a caligraph which the defendant, who was an expert writer thereon, was in the habit of using. About 12.30 on the day in question the defendant borrowed the caligraph and had it away long enough to write the circulars. About 2.30 after the defendant had returned the machine, he came back with a piece



of paper in his hand which looked like foolscap with the edge torn off and similar in appearance to one of the circulars, which he put into the machine and wrote something on. He then went out, and returned in about three minutes and got an envelope, which resembled an envelope enclosing one of the circulars, which he put into the machine. It appeared, however, that the envelope was one of a job lot which a clerk in M.'s office had disposed of amongst the profession. In the type-writer there were peculiarities, namely, in certain of the letters being blurred, which were found in the circulars. The circular also contained expressions similar to those used by defendant in speaking about plaintiff. After C. had been subpoenaed to produce the machine, the defendant advised him not to do so; and a brother of C.'s, of whom the defendant was legal adviser, wrote to C. also advising him not to produce it, but he said he did not write at defendant's request. The plaintiff also tendered evidence as to the defendant's style of composition, which was rejected:—Held, Rose, J., dissenting, (1) that the evidence was not sufficient to be submitted to the jury and it was therefore properly withdrawn from them; and (2) that the evidence of style of composition was properly rejected. *Scott v. Crevar*, 11 O. R. 541—C. P. D. Reversed in appeal, 14 A. R. 152.

See *Wilcocks v. Howell*, 5 O. R. 360, p. 185; *Bradley v. McIntosh*, 5 O. R. 227, p. 223; *Livingston v. Trout*, 9 O. R. 488, p. 188; *Huber v. Crookall*, 10 O. R. 475, p. 189; *Moore v. Mitchell*, 11 O. R. 21, p. 188; *Dominion Telegraph Company v. Silver*, 10 S. C. R. 238, p. 187; *Millette v. Little*, 10 P. R. 265, p. 232.

#### 4. Damages.

Held, per Cameron, C.J., and Galt, J., that in this case the damages were excessive, and they were directed to be reduced to \$1000, provided such sum was paid by a named date and plaintiff elected to take such sum, otherwise a new trial was directed. Per Rose, J., that under the circumstances the damages were not excessive; but as plaintiff's counsel had intimated that a smaller amount would be accepted if paid within a reasonable time, he would accede to the reduction, on plaintiff accepting such amount, otherwise the motion for a new trial should be dismissed. *Massie v. The Toronto Printing Co.*, 11 O. R. 362—C. P. D.

See *Wilcocks v. Howell*, 5 O. R. 360, p. 185; *Livingston v. Trout*, 9 O. R. 488, p. 188; *Dominion Telegraph Co. v. Silver*, 10 S. C. R. 238, p. 187; *Moore v. Mitchell*, 11 O. R. 21, p. 188.

#### 5. Costs.

Where in an action of libel a verdict for \$1 damages was found, and the judge at the trial gave no certificate for costs:—Held, that the plaintiff was entitled to tax full costs. *Garnett v. Bradley*, 3 App. Cas. 944, considered and followed. *Wilson v. Roberts*, 11 P. R. 412—Q. B. D.

#### IV. MISCELLANEOUS CASES.

A recovery of a verdict in an action for libel against some of several parties concerned in the libel, and payment of the amount of verdict and

all costs without judgment being entered, is a bar to an action against others for the same libel. *Wilcocks v. Howell et al.*, 8 O. R. 576—Q. B. D.

See also *Stihwell v. Rennie et al.*, 7 O. R. 355.

#### DELAY.

See LACHES.

#### DELEGATION.

A judicial officer cannot delegate the discharge of his judicial functions to another unless expressly empowered so to do. *In re Queen City Refining Co.*, 10 P. R. 415.—Hodgins, Master in Ordinary.

Of payment. See *Reeves v. Perrault*, 10 S. C. R. 616.

#### DELIVERY.

I. OF GIFT—See GIFT.

II. OF GOODS—See SALE OF GOODS.

III. OF POSSESSION—See SALE OF LANDS.

#### DEMURRAGE.

Held, reversing the judgment of Armour, J., at the trial (Armour, J., dissenting), that in computing demurrage Sunday is to be reckoned as one of the days to be allowed for. "Days" mean the same as running days, or consecutive days, unless there be some particular custom. If the parties wish to exclude any days from the computation they must be expressed. *Gibbon v. Michael's Bay Lumber Company (Limited)*, 7 O. R. 746—Q. B. D.

#### DEMURRER.

See JUDGMENT—PLEADING.

#### DEPOSITS.

See BANKS.

#### DEPUTY RETURNING OFFICER.

See PARLIAMENTARY ELECTIONS.

#### DESCRIPTION OF GOODS.

See BILLS OF SALE AND CHATTEL MORTGAGES.

#### DESCRIPTION OF LAND.

I. IN DEEDS—See DEED.

II. IN PATENTS—See DEED.

III. IN WILLS—See WILL.

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IV. BOUNDARIES—*See* BOUNDARY—DEED—  
WATER AND WATER COURSES.

V. OF ROADS OR RIGHT OF WAY—*See* WAY.

DESERTION.

ALIMONY FOR—*See* HUSBAND AND WIFE.

DETENTION.

*See* CONVERSION.

DEVASTAVIT.

*See* EXECUTORS AND ADMINISTRATORS.

DEVISE.

*See* WILL.

DEVOLUTION OF ESTATES ACT, 1886.

*See* *Re Reddan*, 12 O. R. 781, p. 207.

DIRECTORS.

*See* CORPORATIONS.

DISCHARGE.

OF MORTGAGE—*See* MORTGAGE.

DISCLAIMER.

IN ACTIONS—*See* PRACTICE.

It is not essential to the validity of a disclaimer of a grant of land that it should be by deed or by record. *Moffatt v. Scratch*, 12 A. R. 157.

DISCOVERY.

I. OF DOCUMENTS—*See* EVIDENCE.

II. OF NEW EVIDENCE—*See* NEW TRIAL.

DISMISSING ACTIONS.

*See* PRACTICE.

DISQUALIFICATION.

I. OF MAGISTRATES TO TRY CASES BY REASON OF INTEREST—*See* JUSTICES OF THE PEACE.

II. OF VOTERS—*See* PARLIAMENTARY ELECTIONS.

DISTRESS.

I. FOR RENT.

1. *For what Rent*, 194.

2. *What Goods may be Distrained*, 195.

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IV. DAMAGE FEASANT, 197.

V. UNDER MAGISTRATES WARRANT—*See* JUSTICES OF THE PEACE.

I. FOR RENT.

1. *For what Rent*.

The defendant made a lease under seal to R., dated the 8th November, 1884, for five years from the 12th November, at the rent of \$400, payable half yearly in advance on the 12th November, and May in each year. The lease contained a covenant that, "if the lessee shall make any assignment for the benefit of creditors, \* \* \* the said term shall immediately become forfeited and void, and the full amount of the current yearly rent shall be at once due and payable." R. paid the first half year's rent. On the 5th May, 1885, R. made an assignment for the benefit of creditors; and on the 8th May, the defendant, claiming to do so, under the above covenant, distrained for the half year's rent, which, in the regular course of time, would have been payable in advance on the 12th May:—Held, that the distress was valid; for that under the above covenant it might be held that the money reserved as rent accrued due at the same instant as the lease terminated, and not thereafter; but, even if that construction could not be given to it, the distress would nevertheless be valid, although made for money claimed for rent falling due after the expiration of the term, by reason of the lessee's express personal covenant declaring and constituting the sum as rent; and the covenant which was binding on the tenant was equally binding on the plaintiff as his assignee. *Graham v. Lang*, 10 O. R. 248.—Wilson.

Defendants, in 1881, by indenture under the Short Forms Act, leased certain premises to O., for ten years, at a yearly rent, payable quarterly in advance, with a covenant that if the lease should be taken in execution, or if the lessees should make an assignment for the benefit of creditors, the lease should immediately become forfeited and void, and the next ensuing one year's rent should be at once due and payable. There was also a proviso for re-entry on nonpayment of rent, or seizure or forfeiture of the term for any of the causes aforesaid. In August, 1883, O. assigned to B., as trustee for the benefit of creditors, who went into possession, whereupon defendants distrained for six months' rent then in arrear, and one year's rent payable in consequence of the assignment. Three executions were soon after placed in the sheriff's hands, and the solicitors for the plaintiffs under the first and third executions paid the rent claimed to prevent the sale of the goods by defendants and B., though not admitting defendants' right to it. The sheriff afterwards sold for less than the executions, and repaid the solicitors:—Held, that the distress was illegal, for the statute 8 Anne c. 14, sec. 6, applies only to cases where the

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tenancy has been determined by lapse of time, and not by forfeiture; and that the plaintiff B. was entitled to recover the amount received by defendants. *Graham v. Lang*, 10 O. R. 248, not followed. Per Armour, J.—The year's rent became due only by virtue of the forfeiture, the distress was an unequivocal act indicating the intention to forfeit, and evidence of such an intention previously formed; so that before the distress defendants had elected to treat the term as forfeited and having done so their right to distrain was at an end. Moreover they had not distrained during the possession of the tenants from whom the rent became due, and even if defendants had a right to distrain, the provision making one year's rent payable was fraudulent as against creditors:—Quere, per Wilson, C.J., as to this latter point. Per Armour, J.—The execution creditors for whom the money was paid, in order to enable the sheriff to seize under their executions, might also recover; Wilson, C.J., doubting. *Baker et al. v. Atkinson et al.*, 11 O. R. 735—Q. B. D.

## 2. What Goods may be Distrained.

C. having paid rent due by R. to H. in order to secure the sum so paid and other advances, took an assignment of the residue of the term from R. who forthwith took a lease from C. for a term of three months, the rental being the amount of C.'s advances to R.:—Held, that such a lease, however binding between the parties, could not create the relation of landlord and tenant so as to enable C. to distrain the goods of third parties on the premises, the intention, as disclosed by the evidence set out in the report, being manifestly not to create such relation except as a scheme to enable C. to seize such goods. *Thomas v. Cameron et al.*, 8 O. R. 441—Q. B. D.

A landlord cannot distrain goods held under execution and in custody of the law. See *Grant v. Grant*, 10 P. R. 40.

The judgment of the court below (46 Q. B. 7) reversed, as the plaintiff had not shown that he was solely entitled to possession of the logs, the subject of distress and the seizure as regarded his co-owner being lawful the plaintiff could not maintain replevin, Spragge, C. J. O., dissenting, who thought that even if the logs were the joint property of the plaintiff and one of the tenants, and had been delivered to the millers for the purpose of being manufactured into lumber, they could not be distrained on, for their being on the premises for that purpose had the effect of exempting them from distress; and that under the circumstances there should be a reference back to the judge who had already tried the case to find the facts more distinctly. In the event of that being impracticable that there should be a new trial. *Paterson v. Thompson*, 9 A. R. 326.

## II. FOR MORTGAGE MONEY.

The plaintiff company having brought an action against I., on a mortgage, and claiming damages for having made a distress on F., the tenant of the premises at the request of I., on the reference to ascertain what damage the company had properly sustained by reason of such distress, the master held that the amount of a judgment recovered by F. against the company

was the proper measure, and was conclusive evidence of the amount, although it was proved before him that an offer had been made by I. to the company to furnish witnesses and assist in the defence, and had been declined, and the witnesses when examined showed that their evidence might materially have affected the verdict:—Held, that the ruling of the master was erroneous, and that the case must go back to him to revise his report. *Peterborough Real Estate Investment Co. v. Irelton*, 5 O. R. 47.—Proudford

The plaintiff's father executed a mortgage, declared to be in pursuance of the short form Mortgage Act, of certain land, dated 17th November, 1881, to the defendants, but which was not executed by them, for the term of seven years, the principal and interest being repayable by instalments on the 1st November in each year. The mortgage contained a demise clause for the term of the mortgage at a rental equal to the instalment of principal and interest and due at the same time, and also a distress clause. The mortgagor was to remain in possession until default. He remained in possession and paid the instalments due on the 1st November, 1882 and 1883. He died intestate in December, 1884, when the plaintiff, a son, by arrangement with the other heirs at law and the widow, occupied the land. At the father's death there was due principal \$100, and for interest \$147. The interest was subsequently paid by the plaintiff. In October, 1885, after the interest had been paid, the defendants executed a distress warrant to their bailiff, directing him to levy \$112.50 "the amount of interest due on the 1st November, 1884," under which the bailiff distrained the plaintiff's goods:—Held, that, by reason of the provisions of the mortgage, the mortgagor remaining in possession, and the payments made by him, the relationship of landlord and tenant on the basis of a tenancy from year to year was created between the parties, with the right to distrain, which was not put an end to by the death of the mortgagor:—Held, also, that notwithstanding the distress was stated to be for interest, the defendants, being entitled to distrain for principal, could justify therefor. *McDonnell v. The Building and Loan Association, Toronto*, 10 O. R. 580—C. P. D.

A mortgage made in pursuance of the Act respecting Short Forms of Mortgages, R. S. O. 104, in addition to all the clauses mentioned in the statute, contained the following proviso and variation: "And the mortgagor doth relate to the company all his claims upon the said land and doth attorn to and become tenant at will to the company, subject to the said proviso." The mortgage, among other statutory clauses, provided that the mortgagees on default of payment for two months, might on one month's notice enter on and lease or sell the lands; that they might distrain for arrears of interest, and until default of payment, the mortgagees should have quiet possession:—Held, affirming the judgment of the Court of Appeal (6 A. B. 286), Ritchie, C. J. and Taschereau and Gwynne, JJ., that upon the proper construction of the deed there was no reservation of rent entitling the mortgagees to claim a landlord's right as against an execution creditor of a year's arrears of interest on their mortgage before removal of goods from mortgaged premises by the sheriff. *Trustee Loan Co. v. Lawrasen et al.*, 10 S. C. R. 679.

III. Where the party and the thing out of its possession, c. 180, does not by action, Co.

The defendant with one S. a land for the There was no thing in the a tenants of S. that S. would of others to on Held, that the this agreement damage feasant defendant's removal covenant against 12 A. R. 261.

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## DISTRESS.

- I. STATUTE.
- II. PARTITION.
- III. ACCORDATIONS.
- IV. ADMINISTRATION AND A.
- V. PARTIES AND A.

I. STA. See *Arkell v. Quimby v. Quimby*.

D. Held, that the District Court of Thunder Bay is not subject to jurisdiction of the R. S. O. c. 43, s. 1. District Court has power to land c. Cooper et al., 11

See BANK

DI. I. JURISDICTION. 1. Where

## III. FOR MUNICIPAL TAXES.

Where there is a sufficient distress on the property and the municipality by its own laches puts it out of its power to distrain, sec. 100 of R. S. O. c. 180, does not avail to give the right to collect by action. *Carson v. Veitch*, 11 O. R. 706—C. P. D.

## IV. DAMAGE FEASANT.

The defendants by an agreement under seal with one S. acquired a right of user in certain land for the purpose of pasturing their cattle. There was no demise, or right of distress, or anything in the agreement to make the defendants tenants of S. There was, however, a covenant that S. would not allow his own animals, or those of others to enter upon the land in question:—Held, that the defendants had no right under this agreement to distrain the plaintiff's cattle damage feasant upon the land:—Sembles, the defendant's remedy (if any) was by action on the covenant against S. *Graham v. Spettigue et al.*, 12 A. R. 261.

A distraint of cattle damage feasant cannot be supported unless the cattle are taken at the time the damage is done; if they are driven out after doing damage, they cannot be seized on their re-entry for the former damage. *Ib.*

## DISTRIBUTION OF ESTATE.

## I. STATUTE OF DISTRIBUTIONS, 197.

## II. PARTITION OF ESTATE—See PARTITION.

## III. ACCORDING TO TESTAMENTARY DISPOSITIONS—See WILL.

## IV. ADMINISTRATION SUITS—See EXECUTORS AND ADMINISTRATORS.

## V. PARTIES TO DISTRIBUTE—See EXECUTORS AND ADMINISTRATORS.

## I. STATUTE OF DISTRIBUTIONS.

See *Arkell v. Roach*, 5 O. R. 699; *Re Quimby—Quimby v. Quimby*, 5 O. R. 738.

## DISTRICT COURT.

Held, that the jurisdiction conferred on the District Court of the Provisional Judicial District of Thunder Bay by 47 Vict. c. 14, ss. 4, 5, (Ont.) is not subject to the exceptions to the general jurisdiction of the County Courts mentioned in R. S. O. c. 43, s. 18, and that, therefore, the District Court has power to try actions in which the title to land comes in question. *McQuaid v. Cooper et al.*, 11 O. R. 213—Q. B. D.

## DIVIDEND.

See BANKRUPTCY AND INSOLVENCY.

## DIVISION COURTS.

## I. JURISDICTION.

## 1. Where Actions must be Brought, 198.

## 2. Title to Land, 198.

## 3. Actions on Notes, 199.

## 4. Other Cases, 199.

## 5. Application for full Costs—See COSTS.

## II. ATTACHMENT, 201.

## III. PROCEEDINGS UPON JUDGMENT SUMMONS, 201.

## IV. INTERPLEADER, 201.

## V. PRACTICE, 201.

## VI. EXECUTION, 203.

## VII. APPEAL, 203.

## VIII. ACTIONS AGAINST BAILIFFS, 203.

## I. JURISDICTION.

## 1. Where Actions must be Brought.

The plaintiff lived in Ottawa, and the defendant corporation had its head office at Hamilton. The plaintiff made a mortgage to the defendants, and a dispute arising between the plaintiff and the defendants as to the amount of interest to be paid thereon, the defendants claimed the full interest according to the mortgage, and desired the plaintiff to remit it by mail to their office at Hamilton, which the plaintiff refused to do. The defendants then began proceedings under the power of sale contained in their mortgage, and also an action for the recovery of the land, whereupon the plaintiff paid the money to his solicitors in Ottawa, and the latter sent it under protest to the defendants solicitors in Hamilton, who in turn paid it to the defendants in Hamilton. On an action brought in the Division Court in Ottawa for the recovery of the money so paid under protest:—Held, that when the plaintiff made the payment by reason of the action against him the defendants former direction to pay by deposit of the money in the Ottawa P. O. was superseded; and that the payment having been made by the plaintiff in Hamilton, the whole cause of action did not therefore arise at Ottawa. *Garland v. The Omnium Securities Co.*, 10 P. R. 135.—Wilson.

See *In re Guy v. The Grand Trunk R. W. Co.*, 10 P. R. 372, p. 202; *Re McCallum v. Gracey*, 10 P. R. 514, p. 199. See also *Re Olmstead v. Errington*, 11 P. R. 366.

## 2. Title to Land.

Held, that a prohibition would not lie to the Fourth Division Court of the District of Muskoka, no notice having been given as required by 48 Vict. c. 14, s. 1, (Ont.) amending s. 14 of 43 Vict. c. 8, (Ont.) disputing the jurisdiction of said court; and that in any case prohibition would not lie in this case, the title to the road, upon which the injury complained of arose, not being in question, the road being a colonization road built by the government before the organization of the townships of Medora and Wood as a municipality, and the question arising not being one of title but of liability to keep in repair a road so built. Per Wilson, C. J.—The road in question was a colonization road vested in "the Crown or in a public department or board," and which had not been renounced by proclamation, and the muni-

cipation were not bound to repair it. *In re Knight v. The United Townships of Medora and Wood*, 11 O. R. 138—Q. B. D. Affirmed in Appeal.

See *Re Bushell v. Moss*, 11 P. R. 252, p. 200.

### 3. Actions on Notes.

In an action in the Ninth Division Court of the County of Hastings, on a promissory note for \$200 and interest, the learned judge who tried the case (the junior judge of the county) entered judgment for \$200, the amount of the note, \$7.17 accrued interest and costs:—Held, on a motion for prohibition, that the wording of the statute is clear, namely, "all claims for the recovery of debt or money demand the amount or balance of which does not exceed \$200," and the motion was granted: *McCracken v. Creswick*, 8 P. R. 501, and *Widmeyer v. McMahon et al.*, 32 C. P. 187, referred to and distinguished. *Re Young v. Morden*, 10 P. R. 276.—Rose.

A promissory note was dated at Milton, in the county of Halton, 17th September, 1877, and was for \$100, payable three months after date at Milton, with interest at eight per cent. per annum. The amount claimed was \$149.50. The maker died in the county of Essex, long after the maturity of the note; her will was proved in Essex, and the defendants, at the time of the action resided in that county. The plaintiff having sued upon the note in a Division Court of the county of Halton—Held, that the death of the maker, the circumstances of her making a will appointing the defendants executors, and the proving of the will by the executors were no part of the cause of action, which was complete before the granting of the probate:—Held, also, that the Division Court of Halton, which was sought to be prohibited, had jurisdiction by virtue of 43 Vict. c. 8, ss. 8, 12, (Ont.) *Re McCallum v. Gracey*, 10 P. R. 514.

### 4. Other Cases.

"Mr. Thomas Forfar.—Please ship us your old boiler and engine, to be in good shape, to our address, not later than June 7th, 1883, for the sum of \$115 and shafting.—G. Climie & Son:—Held, that the foregoing order did not ascertain the amount due, so as to bring the case within the increased jurisdiction of the Division Courts under 43 Vict. c. 8, (Ont.) *Forfar v. Climie*, 10 P. R. 90.

The plaintiff brought his action in a Division Court for \$74.31, his claim being \$156.36, an unascertained amount, as against which he admitted a set-off of \$82.05. At the trial in the Division Court the plaintiff affirmed, and the defendant denied, that there had been an agreement between them to set-off against the plaintiff's claim the value of certain purchases made by the plaintiff from the defendant, and the judge at the trial found, as a matter of fact, that there had been such an agreement:—Held, following *Fleming v. Livingstone*, 6 P. R. 63, and *Dixon v. Smurr*, 6 P. R. 336, that it was a question of fact for the judge of the Division Court to determine whether or not there was an agreement between the plaintiff and defendant; and the judge having determined that there was, there was juris-

diction, and a prohibition was refused. *In re Jenkins v. Miller*, 10 P. R. 95.—Cameron.

Application for a prohibition to the judge of the first Division Court of the county of Kent, and to the plaintiffs, to prohibit them from prosecuting this action, which is brought upon a County Court judgment for \$211.87, the plaintiffs abandoning the excess of their claim over \$100, and claiming \$100:—Held, that an inferior court has no jurisdiction to entertain an action brought upon the judgment of a superior court. *Re Eberts et al. v. Brooke*, 10 P. R. 257—Galt Reversed 11 P. R. 296—Q. B. D.

Upon proceedings being taken in the Division Court, in an action in which that court has no jurisdiction, the defendant is entitled to prohibition immediately upon the action being brought, and the fact of no notice of statutory defence being given under sec. 92 R. S. O. c. 47, does not affect the defendant's right to prohibition. *In re Summerfeldt v. Worts*, 12 O. R. 48—Q. B. D.

The plaintiff sued in a Division Court for the conversion of a mirror, which the defendant contended was annexed to the freehold and had passed to him therewith. The judge of the Division Court found that the mirror was a chattel and gave judgment for the plaintiff:—Held, reversing the decision of O'Connor, J., who had directed a writ of prohibition to issue, that, the judge of the Division Court having found as a fact that the mirror was a chattel, his decision should not be interfered with by way of prohibition. *Re Bushell v. Moss*, 11 P. R. 252—C. P. D.

The defendant rented certain premises from the plaintiff for a year, agreeing in writing to pay monthly \$125 therefor, but no formal lease was executed. When the rent had become four months in arrear the plaintiff entered three plaints in a Division Court against the defendant, each for a month's rent, \$125:—Held, that the sums claimed in the three plaints were payable under the one contract, and would have been included in one count under the old system of pleading; and, therefore, that the division into three plaints was improper under R. S. O. c. 57, s. 59:—Held, also, that the defendant's signature to the memorandum of lease could not be construed as ascertaining the amounts claimed in the plaints; and prohibition was ordered. *Re Gordon v. O'Brien*, 11 P. R. 287.—O'Connor.

A Division Court has jurisdiction to entertain a claim for less than \$100 made by a mortgagor upon the surplus proceeds of a mortgage sale which realized less than \$100. Such a claim is an equitable cause of action for money had and received. *Re Legarie et al. v. The Canada Loan and Banking Co.*, 11 P. R. 512.—Boyd.

A claim aggregating more than \$100 and less than \$200, which is made up of two amounts, one liquidated and one unliquidated and both less than \$100, cannot be sued in a Division Court. Per Armour, J.—The claims could not have been sued together before 49 Vict. c. 15, s. 6 (Ont.), and that Act does not expressly or impliedly affect the question. Per O'Connor, J.—But for 49 Vict. c. 15, s. 6 (Ont.), the case would be governed by *Vogt v. Boyle*, 8 P. R. 246. It must be assumed that the legislature intended by that enactment to lay down a rule of combination to regulate the whole subject; and the enactment being

silent as to the here sued on, from the jurisdiction. P. R. 520—Q.

See *Vanden* 138; *Friendly* 202 *In re* 10 P. R. 348,

Of goods of et al. v. Smith

### III. PROCEEDINGS.

The order of ment summons pay the judgment and in default of payment:—Held, that imprisonment was if he did not pay; and prohibition defendant should the court to show any order for merely a minister. 11 P. R. 430.—

On an interpleader Court under 48 in respect of a claim any claims between damages arising, must also be upon by the judgment summons. Whether forward or not, summons is final and no action can respect of them the previous adjudge as a defence. R. 707:—Quarrel can be summary whether an appeal from the adjudication Court on a *Symington et al.*,

A., entered a notice in a Division Court jurisdiction of the trial when the York, upon production of such facts as in the ordinary established jurisdiction entered a judgment for \$44.75. On the ground of showing Archibald the granting of the sum was discretionary to place upon the burden of cross-ex-

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silent as to the combination of such claims as are here sued on, they must be taken to be excluded from the jurisdiction. *Re Walsh v. Elliott*, 11 P. R. 520—Q. B. D.

See *Vandewater v. Horton*, 9 O. R. 548, p. 138; *Friendly v. Needler*, 10 P. R. 267, 427, p. 202. *In re The Merchants Bank v. Van Allen*, 10 P. R. 348, p. 202.

## II. ATTACHMENT.

Of goods of absconding debtor. See *Darling et al. v. Smith*, 10 P. R. 360.

## III. PROCEEDINGS UPON JUDGMENT SUMMONS.

The order of a Division Court judge upon judgment summons directed that the defendant should pay the judgment debt within a fixed period, and in default that he should be committed to gaol:—Held, that the part of the order as to imprisonment was not sustainable; the defendant, if he did not pay within the time limited, was entitled to a day to show cause why he did not pay; and prohibition was ordered:—Sembly, the defendant should have called upon the clerk of the court to show cause against the issuing of any order for imprisonment, as such order is merely a ministerial act. *Re Woltz v. Blakely*, 11 P. R. 430.—Wilson.

## IV. INTERPLEADER.

On an interpleader proceeding in the Division Court under 48 Vict. c. 14, s. 6, sub-s. 3 (Ont.), in respect of a claim to goods taken in execution, any claims between the parties themselves for damages arising out of the execution of the process, must also be brought before and adjudicated upon by the judge who hears the interpleader summons. Whether such claims are then brought forward or not the adjudication upon the summons is final and conclusive between the parties, and no action can afterwards be maintained in respect of them. In such an action the fact of the previous adjudication may be properly pleaded as a defence. Reversing *Wilson, C. J.*, 9 O. R. 767:—Quere, whether the proceedings therein can be summarily stayed on motion:—Quere, whether an appeal lies under c. 14, s. 7, sub-s. 2, from the adjudication of the judge of the Division Court on a claim for damages. *Fox v. Symington et al.*, 13 A. R. 296.

## V. PRACTICE.

A., entered a notice disputing plaintiff's claim in a Division Court suit, and objecting to the jurisdiction of the court, but did not appear at the trial when the junior judge of the county of York, upon proof of the plaintiff's claim, and such facts as in the absence of proof to the contrary established a *prima facie* case of jurisdiction entered a judgment in favour of the plaintiff for \$44.75. On motion for prohibition on the ground of want of jurisdiction:—Held, following *Archibald v. Bushey*, 7 P. R. 304, that the granting of prohibition under the circumstances was discretionary: that it would be unfair to place upon the judge trying the case, the burden of cross-examining the witnesses to ascer-

tain jurisdiction: that if a *prima facie* case of jurisdiction is made out the defendant is himself to blame if it is not displaced: and as neither a good defence on the merits was shewn, nor dispatch used in making the application, the motion was refused with costs. *Friendly v. Needler*, 10 P. R. 267, 427—Rose.—C. P. D.

Service upon a defendant resident out of the jurisdiction is not a principle of practice within the meaning of sec. 244 of the Division Court Act, but a branch or system of practice, or a means of relief which the procedure in Division Courts does not admit of being applied. Neither R. S. O. c. 47, s. 244, nor Rules 8 and 45 O. J. Act, make applicable to Division Courts the statutory rules and practice governing service on defendants out of the jurisdiction in actions in the Superior Courts. *In re Guy v. Grand Trunk R. W. Co.*, 10 P. R. 372.—Osler.

The Grand Trunk Railway having their head office in Montreal, P. Q., are not defendants residing or carrying on business in this province, within the meaning of R. S. O. c. 47, s. 52. *Ib.*

Held, that the service of the writ in this action on the station-master of the defendants at Bowmanville, was void, but the defendants having appeared at the trial, and after their objection to the jurisdiction had been overruled, having proceeded with the defence and cross-examined witnesses, &c.:—Held, that they had thereby precluded themselves from objecting to the jurisdiction. *Ib.*

In an action on a promissory note, brought in a Division Court, M., the indorser, was made a defendant by the order of the judge, and was served by the original defendant, the maker of the note, with a notice claiming relief over and indemnity, but was not served with the summons or a copy of the plaintiff's demand. M. filed a notice disputing the defendant's claim against him and the jurisdiction of the court to try it, and also appeared at the trial, and gave evidence and objected to the jurisdiction. Judgment was given for the plaintiffs against both the original defendant and M.:—Held, that judgment could not have been given against M. in his absence, because the writ of summons and statement of claim had not been served upon him; but that by appearing in the suit and taking part in the proceedings both before and at the trial M. had waived service of the summons and demand. *In re The Merchants Bank v. Van Allen*, 10 P. R. 348.—Osler.

Quere, whether the third party clauses of the O. J. Act apply to Division Courts. *Ib.*

The judge of a Division Court has no jurisdiction to set aside a judgment after the expiry of fourteen days from the trial. *Re Foley v. Moran*, 11 P. R. 316.—Wilson.

Although the defendant has fourteen days to move against a judgment in the Division Court, it is proper for the plaintiff to enter judgment and issue execution forthwith, unless restrained by the judge to a future named day. *Ib.*

The practice under Rule 270, O. J. Act, is not applicable to Division Courts. *Ib.*

See *Woltz v. Blakely*, 11 P. R. 430, p. 201. See also *In re Knight v. The United Townships of Medora and Wood*, 11 O. R. 138.





did not have the effect of again vesting the estate in J. O'N. and R. O'N., so that the dower of their wives attached. *Id.*

In 1881, C. S. mortgaged certain lands to J. A., his wife M. S. joining and barring dower. In 1884, C. S. sold the lands to C. M. S. again joining in the conveyance. C. gave back a mortgage to secure payment of part of the purchase money, which mortgage was made to M. S. On a judgment creditor of C. S. seeking a declaration that M. S. held this mortgage as trustee for C. S., and for a sale and payment thereof of his judgment debt, M. S. alleged that the mortgage was made to her in consideration of her joining in the sale to C., and thus barring her right to dower:—Held, that M. S. had no such right of dower as alleged, and that there was no consideration for the making of the mortgage to C., and that she held the same as trustee for C. *S. Fleury v. Pringle*, 26 Chy. 67, and *Black v. Fountain*, 23 Chy. 174. followed. *Smart v. Soranson et al.*, 9 O. R. 640.—Ferguson.

Where one died entitled to an equity of redemption in certain real estate, which he had originally purchased subject to the mortgage still existing thereon, and the same having been sold in certain administration proceedings, his widow now claimed arrears of dower in respect thereof during the period between the death and sale, when she was in possession by herself or her tenants:—Held, that there being no assignment of dower, and the husband not having died seised in fee so as to give his widow legal dower, she was not entitled to arrears of dower as of right, but only upon the equitable consideration of the court, and the proper mode of exercising the same was to deduct from the rents received by the widow plus an occupation rent charged against her, so much as she had properly applied in meeting necessary outlay and expenditure in respect of the land and buildings, and allow her one-third of the residue as her arrears of dower. *Re Percy, Stewart v. Percy*, 11 O. R. 374.—Boyd.

D., being owner in fee of certain lands, on March 4th, 1884, mortgaged the same, to secure payment five years after date, of certain moneys. On March 15th, 1884, he married the plaintiff, and died intestate on August 16th, 1884. He left no other estate:—Held, that the plaintiff could only claim dower in the equity of redemption, unless she contributed ratably to the amount of the mortgage incumbrance. Method of arriving at the amount of dower in such cases pointed out. *Reid v. Reid*, 29 Chy. 372, commented on. *Dobbin v. Dobbin*, 11 O. R. 534.—Boyd.

## II. RIGHT OF DOWRESS TO PARTITION.

See *Devereux v. Kearns*, 11 P. R. 452.

## III. WIDOWS' ELECTION.

In the case of separate devises though the wife may be barred of her dower in one she is not therefore barred of her dower in the others. *Korean v. Besserer*, 5 O. R. 624.—Proudfoot.

A testator, by his will and codicils, devising his real estate, &c., to G. H. M. and B. M., trustees, and the survivor of them, and the heirs of

such survivor, gave his widow an annuity and provided that when his son should attain the age of twenty-one his trustees should convey to him one-half of the estate and the residue when he should attain thirty, subject however to the annuity. He also provided that if his son should die before attaining the age of thirty, the said trustees or trustee should hold "the said real and personal estate, moneys, and securities, or so much thereof as shall remain in their hands, in trust to distribute the same according to the statute of distributions." The last codicil appointed G. E. T. & G. R. and the survivor of them, and the heirs, executors, administrators and assigns of such survivor new trustees and executors in place of G. H. M. and B. M., with the same powers. The son attained the age of twenty-one, received half of the estate, and died before attaining the age of thirty unmarried and without issue:—Held, that the widow was entitled to her annuity as well as her share under the statute of distributions: but that the testator, having treated the real and personal estate as a blended fund to be distributed, she was not also entitled to dower, and that she must elect between the distributive share and the dower. *Re Quimby, Quimby v. Quimby*, 5 O. R. 738.—Boyd.

J. C., by his will devised as follows: First, I will and bequeath unto my beloved wife, E. C., one-half undivided of the place where I now live being \* \* so long as she shall live and no longer. I also will and bequeath unto my said wife one-half of all the goods and chattels I may own at the time of my demise \* \* Third, I will and bequeath unto my grandson, D. C., and to his heirs and assigns forever, the place or homestead where I now live, it being \* \* with all that appertains thereto: subject, nevertheless, to the following conditions, that is to say; my wife E. C., shall have quiet and peaceable possession of all said premises with all that appertains to said half of said homestead for her own use and benefit as long as she shall live \* \* I also will and bequeath unto my said grandson, D. C., one-half of all the goods and chattels I may own at the time of my demise." In an action by the wife, E. C., claiming both the legacy and her dower, it was:—Held, that she must elect. The testator having treated the homestead as one whole thing, the half of which he specifically bequeathed to his wife. *Card v. Cooley*, 6 O. R. 229.—Boyd.

A will bequeathing to a wife the dwelling-house for her natural life, the household goods and an annuity of \$300 secured to her out of the estate was:—Held not to put the widow to her election. *In Biggar, Biggar et al. v. Stinson et al.*, 8 O. R. 372.—Ferguson.

A testator, after bequeathing certain legacies, devised his lands to his sons, charging them, however, with the legacies and also with an annuity of \$100 to his widow, to whom he also bequeathed his furniture, apartments in his dwelling house, and sundry other things. The estate was sufficient to answer all legacies, and also the widow's dower:—Held, that the widow was not put to her election as between the will and her dower. *Wilson v. Wilson*, 7 O. R. 177.—Osler.

Where a will in express terms makes provision for the testator's wife in lieu of dower, thus bring-



ing directly to her mind that she cannot have dower and the benefits of the will as well, much less dealing with the property left to her, will evidence an election on her part to take under the will, than would be sufficient in the absence of such express provision:—Held, in this case, that, there being such provision, the evidence set out in the report of the case was sufficient to establish an election to take under the will, though otherwise it would not have been. *Nixon v. Ashenhurst*, 7 O. R. 664.—Cameron.

A testator, by his will, left all his real and personal property to J. K., "subject to the following bequest, viz: to my wife E. K. a one-third interest in all my real and personal estate, so long as she shall remain unmarried."—Held, that E. K. was bound to elect between the will and her dower, for the former imported that there was to be the same manner of division of the land as of the personalty, viz: a division of the entire property of each kind, which would be defeated if dower were first subtracted from the realty. *Re Quimby*, *Quimby v. Quimby*, 5 O. R. 738, followed. *Amnden et al. v. Kyle et al.*, 9 O. R. 439.

R. died intestate entitled to real and personal property leaving a widow and children:—Held, that the widow having elected to take her interest under section 4 of "The Devolution of Estates Act, 1886," 49 Vict. c. 22, Ont., was entitled to one-third of the real estate absolutely. *Re Reddan*, 12 O. R. 781.—Boyd.

#### IV. ACTION FOR.

##### 1. Statement of Claim.

The statement of claim in an action of dower alleged that the plaintiff was the widow of L., who died seised of such an estate (in certain lands) as to entitle and give the plaintiff an estate of dower therein:—Held, that the pleadings in dower are governed by the O. J. Act; that the right of dower is a legal conclusion from certain facts, and these facts should be stated in the pleading. The statement of claim was therefore held insufficient, and was struck out, leave being given to amend. *Lauder v. Carrier et al.*, 10 P. R. 612.—Proudfoot—Chy. D.

The writ of summons was indorsed under the O. J. Act with a claim for dower and arrears of dower. The defendant entered an appearance, but added to it an acknowledgment of the plaintiff's right to dower, and a consent to her taking proceedings to have the same assigned to her under the Dower Procedure Act, R. S. O. c. 55. The plaintiff delivered a statement of claim, taking no notice in it of the acknowledgment and consent, and claiming dower and arrears:—Held, that it was necessary for the plaintiff to deliver a statement of claim in order to recover her dower, and she could not, having elected to institute proceedings under the O. J. Act, be compelled to take any steps under the Dower Act. *Moore v. G. Moore—Moore v. P. Moore*, 11 P. R. 324.—Proudfoot.

##### 2. Defences.

##### (a) Barred by Lapse of Time.

The owner of land died intestate in 1858, leaving his widow and two infant daughters in pos-

session, all of whom continued to occupy and cultivate the farm until 1883, when the daughters left the premises. In February, 1884, the widow intermarried with J. M. No proceeding had meanwhile been taken or claim made by the widow to have dower assigned to her. In an action brought by the daughters against J. M. and his wife, to recover possession thereof, the mother claimed she was entitled to retain possession of the premises in respect of her dower, but:—Held, that the right to dower was barred by 38 Vict. c. 16, s. 14, (Ont.) which requires proceedings to be taken to enforce a widow's dower within ten years from the death of her husband. *McDonald v. McRae*, 13 A. R. 121.

##### (b) Striking Out.

In an action for damages for detention of dower, defendants pleaded (1) that the lands in question were wild, and plaintiff was not entitled to the sum claimed for damages, if any; (2) that plaintiff had assigned her claim for damages; (3) set off for moneys expended in respect of said lands; (4) that they did not detain, but were always willing, &c. On a motion in Chambers, after issue joined, for an order directing a reference as to the damages under sec. 47 O. J. Act, and upon evidence by affidavit both for and against the truth of the pleas, the master made an order striking out the 2nd and 3rd pleas, and directing a reference:—Held, that the master had no jurisdiction to make the order, and that the issues raised questions that were properly triable only at the hearing. *Ryan v. Fish et al.*, 10 P. R. 187.—Dalton, Master—Proudfoot.

#### V. ASSIGNMENT OF DOWER.

See *Re Percy*, *Stewart v. Percy*, 11 O. R. 374, p. 205; *Dobbin v. Dobbin*, 11 O. R. 534, p. 205.

#### VI. SALE OF RIGHT OF DOWER UNDER EXECUTION.

See *Douglas v. Hutchison*, 12 A. R. 110.

[See 50 Vict. c. 8.]

#### DRAINS AND DRAINAGE OF LANDS.

See MUNICIPAL CORPORATIONS—WATER AND WATER COURSES.

#### EASEMENT.

##### I. PARTY WALLS—See BUILDINGS.

##### II. WATER—See WATER AND WATER COURSE.

P., the owner of lots 8 and 9, by his will devised the same to trustees in trust to sell. In 1869 the plaintiff purchased from the trustees lot 8, on which there was a house with windows overlooking lot 9, immediately adjoining it, the said lot 9 being then open, and not built upon. In 1873 the trustees sold lot 9 to Mrs. Priestman, who sold to T., who erected a house thereon. T. sold to G., under whom defendant claimed. At

the time P. acquired a mortgage the Priestman subsequently registered by him he was entitled both light and the same had been of T.'s house jury found that not injuriously trustees, at the having merely which in them legal estate, through whom denied with an and that no im- rise. By the 94, acquired the and the equity therein, lot 9 no lot 8 in respect the plaintiff. (c. P. D.

One piece of land by an easement when both below who has, in the right of enjoyment he thinks fit and subservient to the to do,—and if the to be vested in the extinguishment of variously have existed what may have been were in separate to be so, and become easements. is subsequently providing for the there is no implication the land retained ments of necessity made for this purpose are apparent and If the dominant quasi easements v. Atrill v. Platt, 1 See McKenzie p. 235; Platt v. Canada, 12 O. R. Telephone Co., v. O. R. 571.

Where the defendant certain land, p. 209 to him session:—Held, in was entitled to re- tant having thus plaintiff's tenant the defendant from and shewing title might bring to re- t. Harman, 6 O. R. 1

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the time P. acquired lot 9 he did so subject to a mortgage thereon, and the trustees sold to Mrs. Priestman subject to such mortgage, which was subsequently discharged by G., who obtained the usual statutory discharge, which was duly registered by him. The plaintiff claimed that he was entitled by implied grant to the right of both light and air to the said windows, and that the same had been infringed upon by the erection of T.'s house. In an action therefor the jury found that the light had been infringed, but not injuriously:—Held, that by reason of P.'s trustees, at the time they sold to the plaintiff, having merely an equity of redemption in lot 9, which in them never became converted into a legal estate, their equity, transmitted to G., through whom defendant claimed, was not burdened with an easement appurtenant to lot 8, and that no implied grant to light and air could arise. By the discharge of the mortgage on lot 9 G. acquired the legal estate of the mortgagee, and the equity of redemption becoming merged therein, lot 9 never was a servient tenement to lot 8 in respect of the right to light claimed by the plaintiff. *Carver v. Grasett*, 11 O. R. 331—11 P. D.

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One piece of land cannot be said to be burdened by an easement in favor of another piece when both belong absolutely to the same owner, who has, in the exercise of his own unrestricted right of enjoyment, the power of using both as he thinks fit and of making the use of one parcel subservient to that of the other, if he chooses so to do,—and if the title to different parts comes to be vested in the same owner, there is an extinguishment of any easements which may previously have existed, a species of merger by which what may have been, whilst the different parcels were in separate hands, legal easements, cease to be so, and become mere easements in fact—quasi easements. If the quasi servient tenement is subsequently first conveyed without expressly providing for the continuance of the easements, there is no implied reservation for the benefit of the land retained by the grantor, except of easements of necessity, and no distinction is to be made for this purpose between easements which are apparent and those which are non-apparent. If the dominant tenement is first granted, all quasi easements which have been enjoyed as appurtenant to it over a quasi servient tenement retained by the grantor, pass by implication. *Athill v. Platt*, 10 S. C. R. 425.

See *McKenzie v. McGlaughlin*, 8 O. R. 111, p. 235; *Platt v. The Grand Trunk Railway of Canada*, 12 O. R. 119, p. 162. See also, *Bell Telephone Co., v. Belleville Electric Light Co.*, 12 O. R. 571.

#### EJECTMENT.

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Where the defendant, claiming to be the owner of certain land, procured the plaintiff's tenant to return to him and thereby claimed the possession:—Held, in ejectment, that the plaintiff was entitled to recover by reason of the defendant having thus obtained possession from the plaintiff's tenant; but that this was not to stop the defendant from disputing the plaintiff's title and shewing title in himself in any action he might bring to recover possession. *Mulholland v. Harman*, 6 O. R. 546—C. P. D.

In an action of ejectment, G., the landlady of the defendant C. intervened and appeared to the writ. C. did not appear until statement of claim delivered, when he appeared and joined with G. in the statement of defence:—Held, that the appearance of C. was regular. *Goring v. Cameron*, 10 P. R. 496.—Dalton, Master—Osler.

In an action of ejectment the place of trial may be changed by order of a judge. If the power to change is not given by Rule 254, O. J. Act, it is not taken away thereby, and it previously existed under R. S. O., c. 51, s. 23. *Canadian Pacific Railway Company v. Manion*, 11 P. R. 247.—Proudfoot—Chy. D.

An action by a mortgagee for foreclosure, payment, and possession of the mortgaged premises is not an action of ejectment within the meaning of the exception in Rule 254, O. J. Act, and the venue need not therefore in such an action be laid in the county where the lands lie. *Seymour v. DeMarsh*, 11 P. R. 472.—Dalton, Master.

As to joining any other cause of action with an action for the recovery of land. See *Goring v. Cameron*, 10 P. R. 496.

See *Hamilton Provident and Loan Society v. Campbell*, 12 A. R. 250. p. 163.

#### ELECTION.

I. OF DIRECTORS—See CORPORATIONS.

II. WIDOW'S ELECTION—See DOWER.

III. MUNICIPAL—See MUNICIPAL CORPORATIONS.

IV. PARLIAMENTARY — See PARLIAMENTARY ELECTIONS.

V. SUBMISSION OF CANADA TEMPERANCE ACT TO VOTERS—See INTOXICATING LIQUORS.

Election by assignee to allow creditor to retain, at a valuation, property held by him as security. See *Bell v. Ross et al.*, 11 A. R. 458.

Election to waive personal liability on a note and accept the liability of the company by proving against the company on the note, and accepting a dividend thereon. See *Brown v. Howland*, 9 P. R. 48.

#### ELECTRIC LIGHT.

See *Bell Telephone Company v. Belleville Electric Light Company*, 12 O. R. 571.

#### EMINENT DOMAIN.

See MUNICIPAL CORPORATIONS—RAILWAYS AND RAILWAY COMPANIES.

#### ENDORSEMENT.

OF WRITS—See PRACTICE.

## ENTAIL.

See ESTATE.

## EQUITABLE ASSETS.

See *Bank of Toronto v. Hall*, 6 O. R. 653.

## EQUITABLE ASSIGNMENT.

See *Armstrong v. Farr*, 11 A. R. 186; *Brown et al. v. Johnson et al.*, 12 A. R. 190.

## EQUITABLE LIEN.

See LIEN.

## ESCHEAT.

See *Simpson et al. v. Corbett*, 10 A. R. 32.

## ESCROW.

See *Confederation Life Association v. O'Donnell*, 10 S. C. R. 92.

## ESTATE.

I. FOR YEARS—See LANDLORD AND TENANT.

II. FOR LIFE.

1. Generally, 212.

2. By the Curtesy, 212.

3. Dower—See DOWER.

III. ESTATE TAIL, 212.

IV. ESTATE IN FEE, 213.

V. RULE IN SHELLEY'S CASE, 213.

VI. TENANTS IN COMMON, 214.

VII. CONVEYANCE OF—See DEED.

VIII. TRUST ESTATES—See TRUSTS AND TRUSTEES.

IX. ADMINISTRATION OF—See EXECUTORS AND ADMINISTRATORS.

X. CONVERSION OF REALTY INTO PERSONALTY.—See CONVERSION.

XI. DEVOLUTION OF—See DEVOLUTION OF ESTATES ACT.

XII. PARTITION OF—See PARTITION.

XIII. BY DEVISE—See WILL.

XIV. OF PARTICULAR PERSONS.

1. Married Woman—See DOWER—HUSBAND AND WIFE.

2. Infants—See INFANT.

3. Lunatics—See LUNATIC.

4. Tenant—See LANDLORD AND TENANT.

## II. FOR LIFE.

## 1. Generally.

Held, following *Drake v. Wigle*, 22 C. P. 405, that a tenant for life in this country may cut down timber in the proper course of good husbandry, in order to bring the proper proportion of the land under cultivation, and perhaps destroy such timber, but that he cannot cut down timber even for the same purpose, and sell it. *Saunders v. Breakie*, 5 O. R. 603.—Ferguson.

T. and his son D. desired to effect a certain settlement of landed property, but employed a non-professional conveyancer to draw the deed of settlement, who failed to provide for many of the essential provisions of the agreement, and as to the land made T. in consideration of natural love and affection, grant the same to D., his heirs and assigns, habendum "after the decease of T. unto and to the only proper use and behoof of D., his heirs and assigns for ever;" and D. now brought this action for waste against T. :—Held, that the deed was not void as passing only a freehold to commence in futuro, for the habendum is not essential to a deed, and the granting part was sufficient of itself to pass the immediate freehold to D., the expressed consideration of natural love and affection sufficing to carry the use to D., in whom the deed, viewed as a covenant to stand seised, would vest the entire estate. But quare, whether the express limitation of the use in the habendum after T.'s death would not rebut the implication of an immediate vesting of the use at the date of the deed in D., so that the use of so much of the estate as was not expressly limited, viz., for the life of T., resulted to and vested in T. *Dunlop v. Dunlop*, 6 O. R. 141.—Boyd. The decree which directed the deed to be reformed was reversed. See *S. C. sub. nom.*, *Dunlop v. Dunlop et al.*, 10 A. R. 670.

See also *Roan v. Kronsbein*, 12 O. R. 197.

## 2. By the Curtesy.

In 1869 L. married G., his deceased wife's sister. G., having had a son by L., died, in 1871, seised of certain lands of which L. remained in continuous possession until 1883, the time of action brought :—Held, that L.'s occupation was to be attributed to his rightful character, which was that of tenant by the curtesy, so as not to work tortiously against the heir-at-law of the wife. *Re Murray Canal—Lawson v. Powers*, 6 O. R. 685.—Boyd.

It is not necessary to entitle to tenancy by the curtesy that the marriage should have been canonical. *Id.*

## III. ESTATE TAIL.

Held, reversing the judgment of the Court of Appeal, 6 A. R. 312, *Henry, J.*, diss., that the execution and registration in accordance with the revised statutes of Ontario, c. 111, s. 67, of a discharge of a mortgage in fee simple made by a tenant in tail reconveys the land to the mortgagor barred of the entail. *Lawlor v. Lawlor*, 10 S. C. R. 194.

A. by deed seised B. his heirs, ex assigns, "to have his heirs, execute in trust, for the life, and after her life; and after the decease of A., and then in trust to the assigns in A., his heirs and assigns, for ever. But in that event, on the decease of C., I promise to such person shall by his last will, and appointing intestate, then said premises for trustees, and assigns, estate in fee simple life estate of C. created as took the B. Bingham and Ferguson.

Certain owners lands by deed gave and assigns, to his heirs and assigns, his heirs and assigns, 17th, 1875, and Held, that whether Statute of Uses beneficial interest effect as if it were for the benefit of v. Metcalfe, 11 O.

## V. RULE

By ante-nuptial intended to make F. agreed with her son to hold unto K. for him, F., and his heirs, and after the use of the survivor, and after the decease of the heirs of and it was further ment should be executed. After the said ante-nuptial, certain lands, with the co-survivor, to see the same, and to hold upon the trust contained in the a wife having died are children of the as entitled to a c. A. to himself in fee of the ante-nuptial at executory, and the estate in fee simple Shelley's Case. F. v. —Ferguson.

## IV. ESTATE IN FEE.

A. by deed sold and assigned certain lands to B., his heirs, executors, administrators, and assigns, "to have and to hold the same unto B. his heirs, executors, administrators, and assigns in trust, for the sole and separate use of A. for life, and after A.'s decease, in trust for C. for her life; and after C.'s decease, in trust for the heirs of A., and in the event of A. surviving C., then in trust to convey and revest the said premises in A., his heirs, executors, administrators, and assigns, for their own proper use and benefit for ever. But should C. survive A., then and in that event, and in the further event of the decease of C., in trust to convey the said premises to such persons and in such manner as A. shall by his last will and testament order, designate, and appoint. But in the event of A. dying intestate, then in trust to sell and convey the said premises for A.'s heirs, executors, administrators, and assigns":—Held that A. took an estate in fee simple, subject to the intervening life estate of C.; for no such special trust was created as took the case out of the Statute of Uses. *Re Bingham and Wigglesworth*, 5 O. R. 611.—Ferguson.

Certain owners of the equity of redemption in lands by deed granted the same to "A., his heirs and assigns, to have and to hold the same to A., his heirs and assigns, unto and to the use of B., his heirs and assigns." This was dated July 15th, 1875, and registered July 21st, 1875:—Held, that whether this deed operated under the Statute of Uses or not, B. took under it the beneficial interest in fee, and it had the same effect as if it were a conveyance to A. upon trust for the benefit of B. *Imperial Bank of Canada v. Metcalfe*, 11 O. R. 467.—Ferguson.

## V. RULE IN SHELLEY'S CASE.

By ante-nuptial settlement, reciting that F. intended to make provision for his future wife, F. agreed with her and K. to transfer and convey to K. certain property he expected to acquire, to hold unto K. for the joint use and benefit of him, F., and his intended wife during their joint lives, and after the decease of either of them to the use of the survivor during his or her natural life, and after the decease of the survivor, to the use of the heirs of F. as he might by will direct: and it was further agreed that articles of settlement should be executed in pursuance of this document. After the marriage, F., pursuant to the said ante-nuptial settlement, conveyed, in 1879, certain land to K. and his heirs, upon trust, with the consent of F. and his wife, or the survivor, to sell, lease, or otherwise convey the same, and to hold the moneys thereon arising upon the trusts and subject to the powers contained in the ante-nuptial settlement. F.'s wife having died:—Held, that, though there were children of the marriage still surviving, F. was entitled to a conveyance of the lands from K. to himself in fee simple, for that the trusts of the ante-nuptial settlement were executed and not executory, and under them F. had an equitable estate in fee simple by virtue of the rule in Shelley's Case. *Ferris v. Ferris, et al.*, 9 O. R. 24.—Ferguson.

## VI. TENANTS IN COMMON.

A tenant in common occupying the common property is not chargeable with the value of timber cut by him on such property during his occupation. *Munsie v. Lindsay*, 10 P. R. 173.—Hodgins, Master in Ordinary.

See also *Re Kirkpatrick, Kirkpatrick v. Stevenson*, 10 P. R. 4.

## ESTOPPEL.

## I. BY DEED, 214.

## II. IN PAIS.

1. *Title to Property*, 215.
2. *Accepting Dividend*, 215.
3. *Bills of Exchange*, 215.
4. *In Relation to Elections*, 215.
5. *Patents*, 216.
6. *Against denying Liability*, 216.
7. *Other Cases*, 217.

## III. JUDGMENT—See JUDGMENT.

## IV. ESTOPPEL AND WAIVER IN MATTERS OF PRACTICE—See PRACTICE.

## V. AS BETWEEN LANDLORD AND TENANT—See LANDLORD AND TENANT.

## I. BY DEED.

M. C. made a voluntary deed of certain land to L. C. At that time M. C. had no title to the land, it having been previously sold for taxes and conveyed by sheriff's deed to B. There were no recitals or covenants for title in the deed to L. C., and by it M. C. did "assign, transfer, demise, release, convey, and forever quit claim" to L. C., his heirs and assigns, all his estate in the land. Subsequently B. sold and conveyed the land to M. C.:—Held, that the deed from M. C. to L. C. did not operate by estoppel to vest the estate in the land subsequently acquired from B. in L. C., for (1) there was no recital or covenants for title; (2) it did not purport to grant any estate in the land, but merely to assign or release and quit claim to L. C.'s interest therein; (3) it never had any operation, for L. C. never paid anything for the land, never went into possession, never claimed to be owner of it, or paid the taxes, and from the first repudiated the gift. It is a firmly established rule of property in Ontario that covenants for title are sufficient to work an estoppel, though it is otherwise held in England. *Casselman et al. v. Casselman*, 9 O. R. 412.—Proudfoot.

T. to whom the patent of the land in question subsequently issued, by deed poll made prior thereto, bargained, sold, aliened, and confirmed the land in question to L. habendum to L. and his heirs; with a covenant of warranty:—Held, that on obtaining the patent T. was estopped by the deed from setting up title in himself under the patent.—*Robertson v. Daley*, 11 O. R. 352.—C. P. D.

See also *In re Laplante and the Corporation of the Town of Peterborough*, 5 O. R., 634; *Pratt v. The Grand Trunk R. W. Co.*, 8 O. R.

499; *Mogflatt v. Merchants' Bank of Canada*, 11 S. C. R. 46; *The Grip Printing and Publishing Company of Toronto v. Butterfield*, 11 A. R. 145.

## II. IN PAIS.

### 1. Title to Property.

L., a married woman, about the year 1830 assumed to devise certain land to her daughter P. and her husband O. for their lives, and thereafter to their children. T. (one of the children) went into possession of part of it, at the instance of O., about 1855, and built thereon and remained in undisturbed possession for over 28 years. Those who were entitled in remainder under the will (the life estate having expired) brought an action to have the land partitioned or sold, and T. claimed his part by length of possession:—Held, (reversing the judgment of Ferguson, J.) that although T. might be estopped from denying the title of L., still he was not estopped from denying that L. had transferred her title to those now claiming, and that as they claimed under the will of L. (a married woman), made in 1828, before there was power to devise, and so void on its face, they had no title, and T. must succeed. *Board v. Board*, L. R. 9 Q. B. 48, and *Paine v. Paine*, L. R. 18 Eq. 320, distinguished. *Smith*, 5 O. R. 690—Chy. D.

A mortgagee commencing proceedings under a mortgage, one H. C. S. professed to have a claim to some of the property as an alleged partner of the mortgagor, H. E. S. It appeared, however, that H. C. S. was present when the mortgage was given, and knew all about the transaction: that the money which the mortgage was given to secure was partly for the purposes of a printing office, in which only he claimed to be interested as such partner; and that he had, at the time of the transaction, made no objection and asserted no claim:—Held, that, under these circumstances, H. C. S. was estopped from setting up any right or title as against the mortgagees, whose title was the same as if he had joined in the mortgage. *Robinson et al. v. Cook*, 6 O. R. 590.—Ferguson.

See *Mulholland v. Harman et al.*, 6 O. R. 546, p. 209; *Carter v. Grasett*, 10 S. C. R. 105, p. 65.

### 2. Accepting Dividend.

See *Regina v. Bank of Nova Scotia*, 11 S. C. R. 1 p. 169; *Beemer v. Oliver*, 10 A. R. 656, p. 218.

### 3. Bills of Exchange.

Held, in this case, that although plaintiff, by acceptance and payment, was estopped from disputing the signature of the company, the drawers, yet he was not estopped from denying their signature as endorers, even though it was on the bill at the time of acceptance and payment. *Ryan v. The Bank of Montreal*, 12 O. R. 39.—Q. B. D.

### 4. In Relation to Elections.

A trustee of a public school board is not precluded from becoming a relator in a quo warranto

proceeding against another member of the board because he acquiesced in the payment of an account rendered for services which disqualified the member rendering the same from holding the office of trustee. See *Regina ex rel. Stewart v. Standish*, 6 O. R. 408.—C. P. D.

### 5. Patents.

One C. assigned an undivided interest in a patent to B. with whom he entered into partnership. During the partnership B. retained the interest so assigned and upon a dissolution re-assigned simply what he had received without giving any covenant and without asserting by recital or otherwise the validity of the patent. In an action against B. for infringement it was:—Held, that B. was not estopped from disputing the validity of the patent. *The Grip Printing and Publishing Company of Toronto v. Butterfield*, 11 A. R. 145.

### 6. Against Drying Liability.

Under the authority of the Act, 38 V. c. 47, the C. P. & M. R. Co. issued debentures in blank, which were handed to the managing director who subsequently handed them to the plaintiffs as security for a debt of the railway. In an action for an account of what was due under the debentures and payment, or in default a sale, it was:—Held, that the company having issued the debentures in blank and handed them to the managing director, who was also secretary and treasurer, to be dealt with by him at his discretion, he was empowered to complete them by the insertion of the obligee's name, and that the company would be estopped from relying on the fact that the name was not filled in until delivery to the plaintiffs. *Bank of Toronto v. Cohoury, Peterborough and Marmora R. W. Co. et al.*, 7 O. R. 1.—Chy. D.

Plaintiffs estopped from setting up misrepresentation as to loss in procuring the settlement of a claim under a policy. See *The Royal Insurance Co. v. Byers*, 9 O. R. 120.

An executor or administrator is estopped by the fraud or criminal acts of the deceased person he represents from seeking to invalidate securities tainted by such fraud or criminal acts which such deceased person had given to his creditors during his lifetime. *Merchants Bank v. Monteith*, 10 P. R. 467.—Hodgins, Master in Ordinary.

Where a statutory liability is attempted to be imposed on a party which can only attach to an actual legal shareholder in a company, he is not estopped by the mere fact of having received transfers of certificates of stock from questioning the legality of the issue of such stock. Per Strong and Henry, JJ., (Gwynne, J. contra), that although A., a mortgagee of the shares and not an absolute owner, had taken a transfer absolute in form and caused it to be entered in the books of the company as an absolute transfer, he was not estopped from proving that the transfer of the shares was by way of mortgage. 27-28 Vict. c. 23 (sub-s. 19 of s. 5). *Page v. Austin*, 10 S. C. R. 132.

See also *Regina v. The Corporation of the County of Perth*, 6 O. R. 195.

On a motion payer, against them from paying was shewn that been taken as to by the town and be chosen, that support of the and the majority the other. It topped by his co and that McA. the corporation W. having denied site chosen was no sufficient proof—Held, that he purposes of the the members of joined, have been still they were not action was granted of the P. Ferguson.

After the execution for creditors the creditors, at which attended and assigned one of the finding up the estate passed to pay certain examined and registration of the stock brought an action, recovered judgment execution, contented invalid:—Held, that to the assignment of its validity. 683.—Osler.

In an action against the assignor benefit of creditors dividend declared pleaded as a defence the validity of said creditor of the assigned to be seized interpleader issue impeach the said thus repudiated the claim the benefit (assenting), a good were not entitled to the plaintiffs then tried upon held that the plaintiff the assignment impeaching it, this plaintiff's right to state of the insolvent bringing of the action to disentitle Per O'Connor, J., start the plaintiffs position and status under to the benefit of O. R. 415.—Q. yet reported.

It was proved that at the sale in

## 7. Other Cases.

On a motion for injunction by W., a ratepayer, against a town corporation to restrain them from paying for a site for a post office, it was shewn that a vote of the ratepayers had been taken as to which of two sites (one owned by the town and the other by one McA.) should be chosen, that W. had taken an active part in support of the one owned by the corporation and the majority of ratepayers had voted for the other. It was contended that W. was estopped by his conduct from maintaining the suit, and that McA. and the individual members of the corporation should have been made parties. W. having denied that he was aware that the site chosen was to be paid for by defendants, and no sufficient proof of that fact having been given:—Held, that he was not estopped, and for the purposes of the motion, that although McA. and the members of the corporation might not, if joined, have been considered improper parties, still they were not necessary parties, and the injunction was granted. *Wallace v. The Corporation of the Town of Orangeville*, 5 O. R. 37—Ferguson.

After the execution of a deed of assignment for creditors the assignee called a meeting of the creditors, at which the defendant, a creditor, attended and assented to a resolution appointing him one of the trustees to aid the assignee in winding up the estate; and a resolution was also passed to pay certain arrears of wages; and he examined and reported on the amount and condition of the stock. A few days afterwards he brought an action on his claim against the debtors, recovered judgment by default, and issued execution, contending that the assignment was invalid:—Held, that the defendant had assented to the assignment and was estopped from denying its validity. *Gardner v. Kleopfer*, 7 O. R. 663.—Osler.

In an action by a creditor of an insolvent against the assignee under an assignment for the benefit of creditors to recover the amount of the dividend declared upon his claim, the defendant pleaded as a defence that the plaintiff disputing the validity of said assignment had, as an execution creditor of the insolvent, caused the goods assigned to be seized, and on the trial of an interpleader issue directed had endeavoured to impeach the said assignment, and that having thus repudiated the assignment he could not now claim the benefit of it:—Held, (O'Connor, J., dissenting), a good defence and that the plaintiffs were not entitled to recover. It was contended for the plaintiffs that the said action not having been tried upon the merits, the court having held that the plaintiffs being assenting parties to the assignment were estopped from afterwards impeaching it, this defence formed no bar to the plaintiff's right to rank as a creditor upon the estate of the insolvent:—Held, that the mere bringing of the action was a sufficient repudiation to disentitle the plaintiffs from recovering. Per O'Connor, J., that by the judgment of the court the plaintiffs were relegated to their position and status under the assignment, and therefore to the benefit of it. *Kleopfer v. Gardner*, 10 O. R. 415—Q. B. D. Reversed on appeal, not yet reported.

It was proved that the owner was himself present at the sale in question, and purchased one

lot which was ten or eleven ahead of the lot in question, and also another lot three below it on the list; but it was not shewn that he was present when the actual lot in question was sold:—Held, that he was not estopped by conduct from complaining of the sale:—Held, also, that the fact that the owner was informed within three months after the sale of the lot having been sold, when he might have redeemed it, would not deprive him of his right of action. *Claxton v. Shibley et al.*, 9 O. R. 451.—Proudfoot.

The persons applying to quash a by-law incorporating a portion of a township as a village had all voted at the municipal elections holden for the village as incorporated by the by-law in question; one of them had been a candidate for the office of reeve, and another had been elected to the school board, but none of them had in any way promoted the passing of the by-law, or had any part in the taking of the census objected to:—Held, that the applicants were not estopped from moving to quash the by-law. *Re Fenton et al. v. The Corporation of the County of Simcoe*, 10 O. R. 27—Q. B. D.

Of insurance company from setting up conditions in policy. *Caldwell v. Stadacona Fire and Life Ins. Co.*, 11 S. C. R. 212.

The chamberlain of the city of Saint John is authorized, without any previous proceedings, to issue execution for taxes if not paid within a certain time after notice. In order to avoid such execution the bank of New Brunswick paid their taxes under protest:—Held, that such payment did not preclude them from afterwards taking proceedings to have the assessment quashed. *Ex parte James D. Lewin*, 11 S. C. R. 484.

F. being about to indorse notes for the accommodation of B., conveyed his real estate to O., who then conveyed to the wife of F. Afterwards F. became an insolvent under the Insolvent Act of 1875, and the assignee took proceedings to impeach the transaction, the result of which was, that it was declared fraudulent and void as against the assignee, who thereupon advertised the property for sale, and sold it as part of the estate of F. to the defendants. Pending these proceedings the plaintiff had obtained execution on a judgment against F.'s wife, on promissory notes made by her and F., under which the sheriff, after the sale by the assignee, sold all her right, title and interest in the same property to the plaintiff. The plaintiff proved his claim on the notes and received a dividend in the insolvency proceedings against F.:—Held, (1) that he was not estopped by the receipt of the dividend nor by the decree obtained in the suit of the assignee (to which he had not been made a party) from asserting that the property belonged to F.'s wife and was exigible under his execution against her: but (2), that the conveyance to her being in fact shewn to be fraudulent and void against the assignee in insolvency, the plaintiff had acquired no title by the sheriff's sale to himself under the execution, and that the title of the defendants who were in possession under the assignee could not be impeached by the plaintiff. *Miller v. Hamlin*, 2 O. R. 103, as to the effect of the receipt of a dividend, distinguished. *Beemer v. Oliver*, 10 A. R. 656.

The defendant having been paid \$50,000 insurance moneys under various policies effected by



him upon certain lumber, which had been burnt by a spark from an engine of the C. C. R. W. Co., afterwards brought action against the railway company and recovered a verdict of \$100,000; the jury finding that that "was the actual value of the lumber destroyed." The insurance companies now brought this action against him claiming that he was trustee for them for so much of the \$100,000 as represented the excess of the total moneys received by him over the amount of his loss, contending that he was estopped by the verdict from asserting his loss to be greater than that amount. The defendant, however, contended that his actual loss had exceeded the whole \$150,000.—Held, that he was not concluded from so contending by the finding of the jury in his action against the railway company, and that the utmost right of the plaintiffs was to have the amount recovered as damages from the railway company brought into account together with the moneys previously paid by the plaintiffs for insurance in order to ascertain whether the defendant had been more than fully compensated for his total loss by fire and other loss and outlay connected with the litigation, and for these purposes the matter was referred to the master. *The National Fire Ins. Co. et al. v. McTren*, 12 O. R. 682.—Boyd.

On the petition of the plaintiff and other rate-payers in the township of Raleigh, the municipal council passed a by-law for the construction of the Kersey drain and the assessment of the lands which would be benefited thereby, amongst others those of the plaintiff; and in pursuance of such by-law the amount estimated to be requisite for the execution of the work was raised by such assessment. After the drain had been constructed and accepted by the council from the contractors as completed, a balance remained in the hands of the municipality of about \$2,000, which, in compliance with a petition presented by the plaintiff and other contributories to the fund, was refunded ratably to them. The plaintiff had himself been allotted a section of the work for construction, and had been paid therefor, although he had not fully carried out his contract. Subsequently, and after the defendants had so disbursed the full amount of such assessment, the plaintiff claimed to have discovered that the drain had not been properly constructed according to the plans, specifications and profiles of the engineer employed to lay out the same, and sought on behalf of himself and other rate-payers to compel the municipality to complete the drain according to such plans, &c.:—Held, reversing the judgment of Ferguson, J., that the plaintiff being himself a defaulter in the performance of his contract, and having been a party to procuring a distribution of the surplus of the fund which otherwise might have been devoted to attaining the object sought by him, could not require the council to execute work which they had not the means to pay for. *Dillon v. Township of Raleigh*, 13 A. R. 53. Affirmed in Supreme Court.

By Acquiescence. See *The Western Bank of Canada v. Grey & al.*, 12 O. R. 68.

Executors estopped by acts of testator. See *Schroeder et al. v. Rooney*, 11 A. R. 673.

See *Mackenzie v. McGlaughlin*, 8 O. R. 111, p. 235; *Ferguson v. Winsor*, 11 O. R. 88, p. 183.

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## 1. O.

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## 3. In.

## 4. O.

## 5. S.

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## XXII. RIGHT.

## XXIII. IN P.

## 1. Ag.

## 2. Ar.

## 3. Ba.

## 4. Br.

## 5. Co.

## 6. Fr.

## 7. Sal.

## 8. Lib.

## 9. Lin.

## 10. Ne.

## 11. Sed.

## 12. Of.

## 13. Of.

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## XXIV. EVIDENCE IN CRIMINAL CASES—See CRIMINAL LAW.

## XXV. APPLICATIONS FOR NEW TRIAL—See NEW TRIAL.

## I. ADMISSIONS.

1. *Letters Written Without Prejudice*.

Where negotiations with a view to settlement are carried on between the parties and a settlement of a suit concluded by means of letters marked "without prejudice" the letters may be given in evidence to prove the binding contract notwithstanding the restrictive words. *Vardon v. Vardon*, 6 O. R. 719.—Wilson.

A letter containing an offer written "without prejudice," means "I make you an offer, if you do not accept it, this letter is not to be used against me." But when the offer is accepted, the privilege is removed. *Omnium Securities Co. v. Richardson*, 7 O. R. 182.

All communications expressed to be written without prejudice, and fairly made for the purpose of expressing the writer's views on the matter of litigation or dispute, as well as overtures for settlement or compromise, and which are not made with some other object in view and wrong motives, are not admissible in evidence. Where therefore a letter written without prejudice and coming within the above rule was admitted at the trial; the court not being able to say that defendant was not prejudiced, a new trial was directed. *Pirie v. Wyld*, 11 O. R. 422.—C. P. D.

2. *Other Cases*.

At a former trial a copy of an agreement between the parties was admitted in place of the original:—Held that the admission so made was good for the subsequent trial. *McDonnell v. Murray et al.*, 5 O. R. 559.

The statement of one partner on his examination in a suit against the firm as to transactions which occurred during the partnership binds all the partners, unless they seek, by an examination of some of themselves, to contradict or qualify the statements of the partner whose evidence they object to. *Taylor v. Cook et al.*, 11 P. R. 60.—Dalton, Master.

Admissions made before the master in the course of a reference should be put into writing and signed by the party making the same. *Foster v. Allison*, 11 P. R. 233.—Boyd.

A defendant was allowed to attack certain items in an account, which, in the course of a reference, had been admitted to be correct by his former solicitor, since deceased, where the defendant swore that he had not authorized the admissions, and that the items were not properly chargeable against him, and where it was shewn that no report had been made and no change had taken place in the position of the parties by reason of the admissions. *McBean v. McBean et al.*, 11 P. R. 429.—Proudfoot.

In action of seduction. See *Plamby v. McCleary*, 12 O. R. 192.

## II. PRESUMPTIONS.

Where an equity of redemption in a deed conveyed was subject to a mortgage a discharge of which was registered the same day as the deed:—Held, that the deed must be assumed to be delivered before it was registered. *Imperial Bank of Canada v. Metcalfe*, 11 O. R. 467.—Ferguson.

In examining the title the purchaser found a mortgage, which matured over 80 years ago, apparently outstanding, and required the vendors to produce the discharge of it, which they declined to do:—Held, that, under all the circumstances, the mortgage must be presumed to have been paid. *Id.*

A protest is only presumptive evidence of the posting of notices of dishonour of a note, and is insufficient in the face of denial by the endorser that they had received notice. See *Ontario Bank v. Burke et al.*, 10 P. R. 561.

Where the owners of lands, adjoining original road allowances, laid out roads on their lands which were used as public roads for upwards of eighty years, the original road allowances being all that time in the occupation of the owners of the lands, and used and treated as their own property, and no evidence was adduced to raise a presumption that compensation had been paid to them for the roads so laid out:—Held, affirming the judgment of Osler, J.A., 8 O. R. 98, that the presumption was that the original road allowances had been taken and used in lieu of the roads laid out by the owners through their lands, and that a by-law to open up the original road allowance as of right, was invalid. *Burritt v. Marlborough*, 29 Q. B. 119, approved; *Cameron v. Wait*, 3 A. R. 175, explained. *Beemer v. The Corporation of Grimsby*, 13 A. R. 225.

### III. PRIVILEGED COMMUNICATIONS.

#### 1. Generally.

In an action for libel and slander the plaintiff's counsel insisted on the production of a certain anonymous letter written by the defendant to the Ontario Government, relating to the licensing of the plaintiff's hotel. The head of the department attended and declined to produce the letter on the ground that its production would be injurious to the public service, and it was therefore privileged. The judge ordered the letter to be produced, but stated that if the court should hold that the production was not compellable, any verdict recovered would go for nothing. The letter was then produced and read. The judge told the jury that the letter was not evidence of libel as it was privileged, but that it could be looked at as evidence of malice on the slander count. The jury found for the plaintiff:—Held, that the question whether the production of such a document was injurious to the public service, must be determined, not by the judge, but by the head of the department having the custody of the paper, and the production of the document ought not to have been compelled. Under the circumstances a new trial without costs was granted. *Bradley v. McIntosh*, 5 O. R. 227—C. P. D.

### IV. ATTENDANCE OF WITNESSES.

See *George T. Smith Company v. Greely et al.*, 11 P. R. 345, p. 232.

### V. ORDERING WITNESSES OUT OF COURT.

A special examiner has authority to exclude one defendant from his office during the examination of the co-defendant, at the request of the plaintiff. *Culverwell v. Birney*, 10 P. R. 575.—Rose.

At the beginning of a trial all witnesses were ordered out of court, except the parties to the action. Judgment having been given dismissing

the action as against the defendant P., his co-defendant M. entered upon his case and called P. as a witness. P. had remained in court and heard the whole of the evidence adduced by the plaintiff, and his evidence was rejected on this ground:—Held, that the evidence of P. was improperly rejected, and a new trial was ordered. *Mahoney v. Macdonnell* 9 O. R. 137.—C. P. D.

At the trial of an action the witnesses were ordered out of Court. Before the case was closed the defendant's counsel tendered a witness who had remained in court, but the presiding judge refused to allow him to be examined. Held, that there must be a new trial. Per Proudfoot, J. The practice is to receive such evidence, but with great care. *Black v. Besse*, 12 O. R. 522—Chy. D.

### VI. COMPETENCY OF WITNESSES.

Held, following *Regina v. Roddy*, 41 Q. B. 291, that the defendant was properly rejected as a witness in his own behalf. *Regina v. Sparham*, 8 O. R. 570.—Rose.

Since the passing of 45 Vict. c. 10, s. 3, (Ont) the parties to an action for breach of promise of marriage are both competent and compellable witnesses, and may therefore be examined under the C. L. P. Act. *McLaughlin v. Moore*, 10 P. R. 326.—Osler.

Mental capacity. See *Udy v. Stewart*, 10 O. R. 591.

See *Regan et al. v. Waters*, 10 A. R. 85, p. 244. See also *Regina v. McNicol*, 11 O. R. 659.

### VII. EXAMINATION UNDER COMMISSION.

#### 1. Application for Issue of Commission.

A commission will issue to examine a witness notwithstanding that his character for veracity is impeached. The proper course in such a case is to call witnesses at the trial for that purpose. *Nordheimer v. McKillop*, 10 P. R. 246.—Galt.

In an action to restrain an alleged nuisance, caused by the defendants' cattle byres in the city of Toronto, an application was made by the defendants for the issue of a commission to certain cities in the U. S., to take evidence in their behalf concerning the cattle byres in those cities. It was admitted that the only point on which witnesses in the States could be usefully examined was, as to whether proper means had been taken by the defendants to minimize the objectionable accompaniments or incidents of their business. None of the persons sought to be examined were named in the application, nor was it sworn that such persons could not be ready to attend personally at the trial:—Held, upon this state of facts, that the order for the commission must be refused. *The Attorney General v. Gooderham et al.*, 10 P. R. 259.—Boyd.

A commission to take evidence out of the jurisdiction will not be ordered till after issue joined, nor then unless the applicant shews by affidavit what evidence he expects to obtain. *Smith v. Greely*, 10 P. R. 531.—Chy. D.

Upon an application for a foreign commission it is not necessary to shew that the action is

technically at shewn that son which must be *v. Greely et al.*,

#### 2. Taking Evidence.

Books and documents, when a party of the jurisdiction of the witness nation of witness But documents, is sub judice, w for such a purpose Co.—*Chabot's Case*, Master in Ordine

The rules of evidence at a trial cannot be administered in the Master's office in bringing in his files an affidavit the account in direct?" thus cross-examine, in as to each particular question. —Hodgins, Master

An application for interrogatories to the commission t

See *McDonald*

#### 3. Re

Held, that wh been opened before parties, it was to the mode of its d 50 O. R. 65.—Q. B.

A commission v Court of New Br missioners—one n the suit—to take with liberty to take de ex parte if t to attend. Both examination, and examined the wit the return, which signed by one com interrogatories and to the witnesses l that the failure t es according to him was a substant the evidence inea Ritchie, C. J., and W., that the refus the return was m itiate it. Per G should have been s ad not having bee evidence under it *Willie Mutual A* *Wiscoll*, 11 S. C. F. Held, that the c mission to be c at impose restrict of the knowledge o

technically at issue: it is sufficient that it be shown that some issue is raised on the pleadings which must be tried in the action. *Smith et al. v. Greely et al.*, 11 P. R. 38.—Boyd.

## 2. Taking Evidence and Production of Documents.

Books and documents produced in an action may, when a proper case is made out, be sent out of the jurisdiction for the purpose of the examination of witnesses before a foreign commission. But documents produced in another action, which is sub judice, will not be taken from the office for such a purpose. *Clarke v. Union Fire Ins. Co.—Chabal's Case*, 10 P. R. 413.—Hodgins, *Master in Ordinary*.

The rules of evidence as to leading questions at a trial cannot be strictly applied to interrogatories administered under a foreign commission in the Master's office. A party to the suit who, in bringing in his account into the Master's office, files an affidavit verifying it may be asked: "Is the account in the schedule to your affidavit correct?" thus leaving it to the other side to cross-examine, instead of beating about the bush as to each particular item in order to avoid leading questions. *Lockwood v. Bew*, 10 P. R. 655.—Hodgins, *Master in Ordinary*—Proudfoot.

An application to strike out objectionable interrogatories may be made before the issue of the commission to take evidence.—*Ib.*

See *McDonald v. Murray*, 5 O. R. 559, p. 233.

## 3. Return of Commission.

Held, that where a foreign commission had been opened before trial for the convenience of parties, it was too late at the trial to object to the mode of its execution. *Walton v. Appjohn*, 50. R. 65.—Q. B. D.

A commission was issued out of the Supreme Court of New Brunswick directed to two commissioners—one named by each of the parties to the suit—to take evidence at St. Thomas, W. I., with liberty to plaintiff's commissioner to proceed ex parte if the other neglected or refused to attend. Both commissioners attended the examination, and defendant's nominee cross-examined the witness but refused to certify to the return, which was sent back to the court signed by one commissioner only. Some of the interrogatories and cross-interrogatories were put to the witnesses by the commissioners:—Held, that the failure to administer the interrogatories according to the terms of the commission was a substantial objection, and rendered the evidence incapable of being received. Per Ritchie, C. J., and Strong, Fournier, and Henry, JJ., that the refusal of one commissioner to sign the return was merely directory, and did not vitiate it. Per Gwynne, J., that the return should have been signed by both commissioners, and not having been so signed was void, and the evidence under it should not have been read. *Willelle Mutual Marine and Fire Ins. Co. v. Wiscoll*, 11 S. C. R. 183.

Held, that the court in permitting a foreign commission to be opened before the trial, will not impose restrictions as to the use to be made of the knowledge of the evidence which would

be acquired by the solicitors by such opening. *Smith et al. v. Greely et al.*, 11 P. R. 238.—Dalton, *Master*.—Boyd.

## VIII. EXAMINATION BEFORE TRIAL OF PARTIES AND WITNESSES.

### 1. Time of Application.

The former Chancery Practice as to the stage of the cause at which examination of parties may be had now governs in all Divisions of the High Court. In this case an appointment to examine under sec. 159 of the C. L. P. Act was set aside because the affidavit required by that section had not been filed. *Tilsbury Manufacturing Co. v. Goodrich*, 10 P. R. 327.—Dalton, *Master*.

### 2. Persons for whose Immediate Benefit Action is Prosecuted.

One M., having effected certain insurances in his favour, assigned one of the policies to the plaintiff, one of his creditors, and the other to one C., as trustee for the benefit of creditors. In actions on such policies:—Held, that M. was examinable under Rule 224 O. J. Act as "a person for whose immediate benefit" the suits were prosecuted. *Macdonald v. Norwich Union Ins. Co.*; *Clarkson v. Fire Ins. Association*, 10 P. R. 462.—Rose.

An action against an endorser of a promissory note, brought by a member of the firm of bankers who discounted it. The firm was composed of two members only, B. and M., who had dissolved partnership, and the action was brought after the dissolution in the name of M. only. The Master in Chambers made an order under Rule 224 O. J. Act for the examination of, and the production of documents by B., as a person for whose immediate benefit the order was being prosecuted. On appeal, Rose, J., thought the evidence as to the interest of B. unsatisfactory, but refused to set aside the order of the master, varying it, however, by directing that the examination of B. and his affidavit on production should not be used except for the purpose of discovery. *Minkler v. McMillan*, 10 P. R. 506.—Dalton, *Master*—Rose.

### 3. Officers of Companies.

A station agent of a railway company is an officer examinable under R. S. O. c. 50, s. 156. *Ramsay v. Mulland R. W. Co.*, 10 P. R. 48.—Dalton, *Master*—Wilson.

Chy. G. O. 268 has been superseded by Rule 283 O. J. Act. A party to an action cannot now be examined upon his affidavit on production, with this exception that by Rule 226 O. J. Act an officer of a corporation may be so examined. *Frith v. Ryan*, 10 P. R. 235.—Dalton, *Master*.

In an action upon a fire insurance policy against a company:—Held, that the local agent of the company, who received the application and the premium and issued the interim receipt, and his successor, who had charge of the agency when the fire occurred, were properly examinable for discovery, before the trial, as officers of the company under the C. L. P. Act. Quare,

whether a person may be an officer examinable for the purposes of discovery, but not one whose evidence can bind the company. *Goring v. The London Mutual Fire Ins. Co.*, 10 P. R. 642.—Rose.

#### 4. Witnesses under Rule 285, O. J. Act.

An order for the examination of a witness before trial under O. J. Act, will not be made where no greater necessity for it is shewn than the convenience of the party who applies for it in preparing, and presenting his case for trial. *Carnegie v. Federal Bank*, 10 P. R. 69.—Ferguson.

Upon a motion pending, witnesses may still by G. O. Chy. 266 be examined under a subpoena and appointment. That order has not been superseded by Rule 285 O. J. Act. *Township of Monaghan v. Dobbin*, 2 C. L. T. 260, overruled. *McMillan v. Wansborough*, 10 P. R. 377.—Ferguson.

A clerk in a Toronto warehouse accepted a bill of exchange on behalf of his employer, who resided in Philadelphia, U. S. In an action on the bill the employer denied the authority of his clerk to accept:—Held, reversing the decision of the master, that the clerk could not be examined under Rule 285, O. J. Act. Semble, neither could the Toronto manager of the business be examined under the Rule. *Rosenheim v. Silliman*, 11 P. R. 7.—Rose.

The powers of the special examiner under G. O. Chy. 147, as to directing the production of documents, extend to examinations under Rule 285, O. J. Act. Upon an examination of a party under Rule 285, at a stage of the action earlier than an examination will be ordered as of course, only material documents should be produced such as would be produced in the ordinary course at a later stage. *Orpen v. Kerr*, 11 P. R. 128.—Boyd.

The right of extraordinary discovery must be jealously guarded, lest it be abused, and it should under Rule 285, O. J. Act, be conceded only when it is clearly proved to be necessary for the furtherance of justice. An application to examine under Rule 285 is in the discretion of the court, and that discretion cannot be said to have been wrongly exercised in allowing the defendant to examine the plaintiff and three witnesses before delivering the defence, in order to obtain for the purpose of pleading a knowledge of material facts, which the defendant could not otherwise get. *Boulton v. Blake*, 11 P. R. 196.—Boyd.

The defendants asserted as a counter claim in this action a claim against the plaintiff, which they had bought from the assignee for creditors of F. & L., stock brokers, who were not parties to the suit. This claim was the balance of an account for carrying stock for the plaintiff. The plaintiff swore that he believed that F. and L. had dealt improperly with the stock that they were carrying for him, but that he had no means of discovering what they had done with it unless by examining them. Under these circumstances an order was made under Rule 285, O. J. Act, for the examination of F. and L., for the purpose of discovery only. *Carnegie v. Cox et al.*, 11 P. R. 311.—Dalton, Master.

The plaintiff, who was the father of A. S. M., an insolvent trader, sued the assignee and trustee for the benefit of creditors of A. S. M., claiming a declaration of right to rank on the estate for a large sum. The assignee was instructed by the creditors to resist the claim and had himself no personal knowledge of it, and could find no entry of it in the books or papers of A. S. M. Under these circumstances an order under Rule 285 for the examination of A. S. M. by the defendant, for the purposes of discovery before the trial, was affirmed. *Murray v. Warner*, 11 O. R. 440.—Ferguson.

Where the plaintiff had a good cause of action against the defendant, but was unable to frame his statement of claim unless he could examine the defendant and his employer, who was not a party to the suit:—Held, that he was entitled to such discovery under Rule 285, O. J. Act, and that an order for such examination by a local judge of the High Court had been properly made. *Gordon v. Phillips*, 11 P. R. 540.—Q. B. D.

#### 5. De Bene Esse.

Held, following the former Chancery Practice, that a local judge may make an ex parte order for the examination of a witness de bene esse, on the ground that he is dangerously ill, and not likely to recover. *Baker v. Jackson*, 10 P. R. 624.—Rose.

Semble, that an affidavit of the solicitor of his information and belief, with the grounds thereof, of that the witness is dangerously ill is sufficient. The affidavit, and the circumstance that the order was not acted upon for thirteen days after it was issued, were regarded as unsatisfactory, and limitations were imposed on the use of the evidence taken under the order. *Ib.*

No order of any moment should be made ex parte, except in a case of emergency. The point in dispute in the action was as to the genuineness of a document, which the plaintiff alleged to be a forgery, obtained either by imitation of his signature, or by personation:—Held, that no order should be made which would have the effect of saving the plaintiff from personal attendance at the trial, and examination before the court and jury. *Thomas v. Storey*, 11 P. R. 417.—Rose.

#### 6. Order to Produce.

Where, after judgment in an action in the Common Pleas Division, an issue on a garnished application was directed to be tried under Rule 373, O. J. Act, by a county judge and jury:—Held, that such judge had no jurisdiction to make an order to produce before trial, and consequently no authority to make any order on a failure to produce. *Cochrane v. Morrison*, 10 P. R. 606.—Rose.

See *McGregor v. McDonald et al.*, 11 P. R. 386, p. 231.

#### 7. Production of Documents.

##### (a) Generally.

Upon a motion for a better affidavit of documents from the defendants, the Merchants' Bank,

the plaintiffs' motions of an order for a previous motion. *The Merchants' Bank v. The Merchants' Bank*, 11 P. R. 386, p. 231.

The plaintiff mentioned "the particular" and stated "this court on his discharge and believe" was sufficient to inspect the documents were filed, or them transmitted to their own place of deposit to shew the contents of documents. *Jones v. Montagu*, 11 P. R. 386, p. 231.

The usual affidavit made by an officer of a statement to produce their report that they would produce books "as an officer of the court" that the company had the said books in their possession in the affidavit called, as locomotive engines, defendants. The evidence taken, be unsealed:—Rose, J., 10 P. R. 624, showed a right books of the court. *Canada Atlantic*, 11 P. R. 386, p. 231.

Even again, court is reasonably represented by documents, will be ordered. The Monte V. be accepted as of the product read in conjunction with Emerson, 10 P. R. 386, p. 231.

Semble, a second affidavit of document is made on production of second motion which did not motion. *Brown et al.*, 11 P. R. 386, p. 231.

The object of actions, is to establish the existence and contents of the documents, and when documents will be produced by party producing. P. R. 1.—Hodges, 11 P. R. 386, p. 231.

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the plaintiffs were allowed to read the depositions of an officer of the bank taken for use upon a previous motion in the action. *Pawson et al. v. The Merchants Bank et al.*, 11 P. R. 18.—Boyd.

The plaintiff, in his affidavit of documents, mentioned "other letters and papers filed herein, the particulars of which I cannot now depose to," and stated "that such documents were filed in this court on the motion made by defendant for his discharge from custody, as I am informed and believe."—Held, that the plaintiff's affidavit was sufficient; and that the defendant must inspect the documents at the office where they were filed, or take the necessary steps to have them transmitted to the office of the court at his own place of abode. Held, also, that an affidavit to shew the incorrectness of the affidavit of documents could not be received, following *Jones v. Monte Video Gas Co.*, 5 Q. B. D. 556. *Lyon v. McKay*, 10 P. R. 557.—Rose.

The usual affidavit on production of documents, made by an officer of the defendants, contained a statement that the defendants objected to produce their repairs book and train register, but that they would produce such portions of the books "as are relevant for inspection at the offices of the company"; and a further statement that the company "had sealed up such parts of the said books as do not relate to the matters in question in this action." At the trial the plaintiff called, as witnesses, the train despatcher, locomotive engineer, and an engine driver of the defendants. The presiding judge refused, on the evidence then given, to direct the books to be unsealed:—Held, reversing the order of *Rose, J.*, 10 P. R. 553, that the facts of the case shewed a right in the plaintiff to have these books of the company produced. *Moxley v. The Canada Atlantic R. W. Co.*, 11 P. R. 39.—Q. B. D.

Even against a party's own affidavit, if the court is reasonably certain that he has erroneously represented or misrepresented the nature of documents, a further affidavit on production will be ordered. The rule laid down in *Jones v. The Monte Video Gas Co.*, 5 Q. B. D. 556, may be accepted as the general rule on the subject of the production of documents, but it should be read in conjunction with *The Attorney General v. Emerson*, 10 Q. B. D. 191. *Ib.*

Semble, a second application for a better affidavit of documents is improper, where no objection is made on the first application to the non-production of the documents in question, the second motion not being made upon any materials which did not exist at the time of the first motion. *Broughton v. The Citizens Ins. Co. et al.*, 11 P. R. 110.—Dalton, Master.

The object of the production of documents in actions, is to enable either party to discover the existence and acquire a knowledge of the contents of the deeds and writings relevant to the case; and when that object is accomplished the documents will go back to the custody of the party producing them. *Darling v. Darling*, 10 P. R. 1.—Hodgins, Master in Ordinary.

The master has a discretion to direct parties to leave documents in his office so long as any useful purpose may be answered by their remaining there, and then to allow the party producing them to take them back. *Ib.*

In an action to establish a will, which the defendants impeached for want of testamentary capacity, and set up a prior will, the defendant included in his affidavit on production, copies of letters from himself to the testatrix, but objected to produce them for inspection on the ground that they were never mailed or sent to their destination. Their materiality and relevancy to the issues was not disputed:—Held, that all memoranda and writings, or pieces of paper with writing on which may throw light on the case, whether they would or would not be evidence per se, are subject to production, unless they can be protected; and the mere fact in the case of a letter that it was not forwarded to its destination is no ground of exemption. These letters were therefore ordered to be produced. *Cameron v. Cameron*, 10 P. R. 522.—Boyd.

#### (b) Withholding on the ground of Privilege.

Letters, written to the defendant company by a clerk, who was specially instructed to investigate the plaintiff's accounts and take the advice of the company's solicitors, and which contained references to their advice, were held privileged from production. *Broughton v. The Citizens Insurance Company et al.*, 11 P. R. 110.—Dalton, Master.

Among the grounds of defence set up in an action to recover the amount of a policy of insurance were, that the plaintiff's books had been falsified; and that the fire had occurred through the wilful negligence of the plaintiff. The defendants employed two experts to investigate the plaintiff's books and his conduct with respect to the fire, and these experts made reports. The defendants affidavit on production set out as documents which they objected to produce: "Report of adjuster for Norwich Union Fire Insurance Society for counsel's opinion thereon," "Various memoranda taken by adjuster for preparation of report, and for information of counsel." It was further stated in the affidavit that these documents were "privileged, being part of the defendants' case and prepared for the instruction of counsel, and prepared specially for this litigation and in contemplation thereof."—Held, on appeal, reversing the decision of the master in chambers, that these documents were privileged from production. *Macdonald v. Norwich Union Fire Insurance Company*, 10 P. R. 501.—Rose.

G. was general solicitor for the bank, and was actively engaged in negotiating the transaction impeached in the action, not only on behalf of the bank but on behalf of himself and of other persons:—Held, that letters written to the bank by G. in reference to the transaction in question were not privileged from production. *Pawson et al. v. The Merchants Bank et al.*, 11 P. R. 18.—Boyd.

To obtain privilege for a document mentioned in an affidavit on production, the grounds upon which it is claimed must be stated. A statement that according to plaintiff's contention a document contains a libel, and therefore exposes the defendant to a criminal charge, is not sufficient to protect the document; the defendant must go further and express his belief that the production of the document will expose him to a criminal charge. *Bromley v. Graham*, 11 P. R. 457.—Dalton, Master.

The defendant D. M. McD. claimed privilege for certain documents in his possession, asserting that he held them merely as solicitor for his mother and co-defendant, F. McD. No order to produce had at the time of the application been taken out as against F. McD., nor had she been served with notice of the application:—Held, that D. M. McD. should not have been ordered to produce these documents without F. McD. being called upon to shew cause why they should not be produced. *McGregor v. McDonald et al.*, 11 P. R. 386—C. P. D.

In an action to recover back payments made by the plaintiffs to the defendants, who were contractors for the building of the plaintiff's line of railway, on the ground that the progress certificates upon which the payments were made were false and fraudulent:—Held, that documents shewing the results of measurements and surveys made by the plaintiffs for the purpose of litigation were privileged from production, even if they were procured for the purpose of another action between the same parties; but,—Held, that information obtained by means of the measurements and examination of the company's surveyors was not per se privileged; and the plaintiffs were therefore ordered to give particulars of the errors in the certificates on which they relied, although this might involve the disclosing of matters of fact derived from privileged communications. *Canada Pacific R. W. Co. v. Connee et al.*, 11 P. R. 297.—Boyd—C. of A.

See *Bradley v. McIntosh*, 5 O. R. 227, p. 223.

#### 8. Conducting Examination.

The general law applicable to discovery governs in patent cases. A defendant may be properly interrogated as to the grounds of his attacking a plaintiff's patent, and there should be a fair and full disclosure of the particular lines of attack which are contemplated, but no such individualizing of the persons who are alleged to be prior users as would enable the plaintiff to fix upon the defendants witnesses. *Smith v. Greay et al.*, 10 P. R. 482.—Boyd.

The proper mode in examinations for discovery, where a witness neglects or refuses to produce, is for the examiner to direct what documents shall be produced and have the examination adjourned for that purpose. The practice of enabling a party by means of a subpoena duces tecum to get production on a two day notice of any documents he chooses to particularize is not to be encouraged, and a motion to commit for non-production was refused. It is desirable to postpone examinations for discovery until after production. *Lavery v. Wolfe*, 10 O. R. 488.—Boyd.

The O. J. Act has introduced a new intermediate practice, departing in some measure from the old rules of Chancery and Common Law, such new practice being indicated by Rule 235; that where a question has been substantially answered, a further answer ought not to be compelled, and when discovery would be oppressive, it is the duty of the court to exercise its discretion by refusing discovery, as also where the discovery cannot possibly help the plaintiff to obtain a decree. *Parker v. Wells*, 18 Chy.

D. 477, considered and followed. *McGregor v. McDonald et al.*, 11 P. R. 386—C. P. D.

#### 9. Opening Publication.

A petition by the plaintiffs for leave to produce newly discovered evidence, and to re-open the case for its admission after the judgment of the Court of Chancery in favour of the defendants had been affirmed by the Court of Appeal and the Supreme Court of Canada, was brought on for hearing before Proudfoot, J., in Court:—Held, that as the application might, before the O. J. Act, have been made to a single Judge, and as there is no provision in that act specially applicable to the subject, the original practice of the court remains, and the application was properly made to a single judge. *Synod v. DeBlancquiere*, 10 P. R. 11.

Held, that upon the discovery of material evidence publication may be opened even after judgment affirmed by the two courts above. The learned judge here considered that what was proposed to be introduced as new evidence was not material, and dismissed the petition, with costs. *Id.*

#### 10. Costs.

The president of the plaintiffs lived in the U. S., but being in Toronto, he was there subpoenaed on the 22nd April to attend on the 28th April, for examination for discovery before a special examiner at Toronto. He was paid \$1. and made no objection as to the amount, nor did he object that he was prevented by engagements from attending, but he failed to attend:—Held, that he should have attended on the day appointed, and that the fact that there were then pending against him, at the instance of a stranger to the action, proceedings for perjury, which might affect some point in controversy, though it might be a reason for his refusing to answer any question on this point, was not a reason for refusing to attend at all; and he was ordered to attend at his own expense. *Bolekow v. Foster*, 7 P. R. 388, distinguished. *George T. Smith Company v. Greay et al.*, 11 P. R. 345.—Boyd.

### IX. EVIDENCE AND EXAMINATION OF WITNESSES.

#### 1. Refusing to Answer.

In an action of libel against a husband as the writer of libellous articles, and as editor of a newspaper in which they were printed, and his wife as owner and publisher of the newspaper, on examination after issue joined in the action, the husband refused to answer questions as to the ownership of the newspaper on the ground that his answers might tend to expose his wife to a criminal prosecution for publication of the libels, and the wife refused to answer questions as to the authorship of the newspaper articles in question, and as to the editing of the newspaper, on the like grounds as to her husband:—Held, on appeal, that defendants were justified in their refusals. *Millette v. Little*, 10 P. R. 265.—Galt.

Held, that the penal provisions of the statute 13 Eliz. ch. 5, afford no excuse for a refusal by

a defendant in a fraudulent case to him regarding *Dunsford v. C.*

See also *R.*

### X. JUDICIAL.

In an action land in Win which was reduced by the official custodian under a commission part with it, by hand and office was attached at the trial. the commission that the agreement was the original defendants, and mission was the registrar's certificate under O. J. Act, and the absence accounted for he received by *v. Murray et al.*

Evidence given before an examination and answer. by the examination trial:—Held, as amended by J. Act, Rules properly received for apart from evidence to support under Rule 311 miscarriage is of interfere. *Id.*

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a defendant in an action brought to set aside a fraudulent conveyance to answer questions put to him regarding the fraudulent transaction. *Dunsford v. Carlisle*, 10 P. R. 449.—Boyd.

See also *Regina v. McNicol*, 11 O. R. 659.

#### X. JUDICIAL, OFFICIAL, AND OTHER PUBLIC DOCUMENTS.

In an action on an agreement for the sale of land in Winnipeg, Manitoba, the agreement, which was registered by defendants was produced by the Registrar of Winnipeg, in whose official custody it was, on his examination under a commission. The Registrar refused to part with it, but left a copy certified under his hand and official seal to be a true copy, which was attached to the commission, and produced at the trial. One M., who was examined under the commission, and also at the trial, proved that the agreement produced by the registrar was the original, and that it was signed by the defendants, and the copy attached to the commission was a true copy:—Held, that the registrar's certificate as to the copy was sufficient under O. J. Act, Rule 203, and that a certificate by the commissioner was not required; that the absence of the original was sufficiently accounted for by means of the copy. *McDonald v. Murray et al.*, 5 O. R. 559—C. P. D.

Evidence given by one F., a witness, was taken before an examiner in shorthand, by question and answer. The evidence was duly certified by the examiner and an office copy put in at the trial:—Held under R. S. O. c. 50, ss. 165, 166, as amended by 41 Vict. c. 8, s. 8, (Ont.), and O. J. Act, Rules 282, 285, the evidence was properly received: but that this was immaterial, for apart from F.'s evidence, there was sufficient evidence to support the finding of the jury, and under Rule 311, where no substantial wrong or miscarriage is occasioned, the Court will not interfere. *Id.*

The shorthand notes of the shorthand writer employed by the court to take down the evidence were not extended in his handwriting, but were signed by him:—Held, that the notes of evidence could not be objected to. *Megantic Election—Cote v. Goulet et al.*, 9 S. C. R. 279.

Certain alleged copies of Journals of Parliament were tendered in evidence. It was not proved that originals of which the copies tendered were said to be copies ever existed, nor was it shewn that the copies tendered were copies of any original. They were, however, shewn to have come from the Parliamentary library at Ottawa, and most of them purported to have been printed by the Queen's printer:—Held, that, in the absence of a statute making them admissible, they could not be received. *Langtry et al. v. Dunoulin et al.*, 7 O. R. 499.—Ferguson.

Action for malicious prosecution and slander. The malicious prosecution arose out of a charge before a magistrate and a subsequent indictment preferred at the Quarter Sessions. In proof of the termination of the criminal proceedings, the plaintiff produced in evidence, which was admitted subject to objection, the original indictment endorsed "no bill":—Held, that this was

not sufficient, but that a record should have been regularly drawn up and an examined copy produced. *McCann v. Preneveau*, 10 O. R. 573.—C. P. D.

See *In re H. L. Lee*, 5 O. R. 583, p. 264.

#### XI. PRIVATE DOCUMENTS.

##### 1. Plans.

Certain maps of the city of Toronto, made by city surveyors in 1857 and 1858, shewing thereon a square marked "Bellevue square," were offered in evidence to shew the boundaries of the square. It was shewn that the defendant knew of these maps, but they were not prepared under his instructions:—Held, that the maps could not be received in evidence to shew the boundaries of the square. Per Hagarty, C. J. O., and Osler, J. A.—The maps were admissible to shew that there was such a square known as Bellevue square, but not as evidence of title or boundary. Per Burton, J. A., and Patterson, J. A.—The maps were not admissible in evidence without its being shewn that they had been prepared under the instructions of the defendant, or on information given by him. The parol evidence shewing that but a portion of the land claimed by the plaintiff to be the square was undoubtedly within the limits of the square, the appeal was allowed as to all but that portion. *Van Koughnet v. Denison*, 11 A. R. 699.

Remarks on the serious consequences likely to arise from the constant changes in the names of streets in the city of Toronto. *Id.* See 50 Vict. c. 29, s. 26.

Held, in this case, that inasmuch as the conveyances to the parties were made according to the first plan, the second plan could not be invoked to aid in ascertaining the limits of the lots conveyed. *Grasett v. Carter*, 10 S. C. R. 105.

##### 2. Church Canons.

Certain evidence offered of the contents of a canon of the Church Society or Synod discussed. *Langtry v. Dunoulin*, 7 O. R. 499.—Ferguson.

#### XII. PAROL EXPLANATION OF DOCUMENTS.

##### 1. To Vary or Explain Deeds.

###### (a) Description of Land.

Extrinsic evidence of monuments and actual boundary marks is admissible to control the deed, but if reference is made by the deed to such monuments and boundaries, they control, though they may call for courses, distances, or computed contents which do not agree with those in the deed. *Grasett v. Carter*, 10 S. C. R. 105.

D. sold to the predecessor in title of the plaintiff certain lands, and the deed contained the following (which was held to amount to a covenant, the benefit of which passed to the plaintiff):—"Bellevue square is private property, but it is always to remain unbuild upon except one residence with the necessary outbuildings including porter's lodge." The land having been sold under a mortgage, a portion came again to the hands of D., who proceeded to convey parts of it for building purposes:—Held, that parol evidence was



admissible to show what was meant by "Bellevue square," no plan or description being incorporated in the deed. *VanKoughnet v. Denison*, 11 A. R. 699.

See *McGregor v. Keiller* 9 O. R. 677, p. 243.

(b) *Other Cases.*

The plaintiff sought to restrain the defendant from cutting timber on lands demised to him, contrary to the covenants in the indenture of lease. At the trial the defendant tendered parol evidence of an agreement between himself and the plaintiff, distinct from and prior to the lease, which, he contended, modified the restrictions in the lease, and gave him the right to cut the timber:—Held, affirming the decision of *Ferguson, J.*, that the evidence of the parol agreement could not be admitted. *Gilroy v. McMillan*, 6 O. R. 120—Chy. D.

Where the plaintiff brought an action to redeem a certain property conveyed by him in a deed absolute in form, and it appeared that the deed in question which he now sought to cut down to a mortgage, had indeed been executed by him for the purpose of securing a debt due to the grantee, but that the main object of the transaction was to protect the property from the results of an anticipated action for breach of contract:—Held, that under these circumstances, evidence was not admissible to rectify the form of the instrument, for this Court never assists a person who has placed his property in the name of another to defraud his creditor; nor does it signify whether any creditor has been actually defeated or delayed. The decided weight of authority is that after the property passes, whether by the execution of a written instrument or by other means sufficient in law, it is not open for the fraudulent grantor to undo the matter either out of court or by the aid of the court. *Symes v. Hughes*, L. R. 9 Eq. 497, commented upon. *Mundell v. Tinkis et al.*, 6 O. R. 625.—Boyd.

The plaintiff, by a lease under seal, leased to the defendant a shop, save and except the bottom portion of the east window, and save and except a portion of the shop described by metes and bounds. The defendant alleged that prior to his accepting the lease, and entering into the consideration for such acceptance, an independent and collateral parol agreement, separate and distinct from and not made part of the lease, was entered into, whereby the defendant was to have permission or license to remove certain shelving, &c., and to fit up the shop, including the portion reserved by the plaintiff, with handsome and ornamental show cases, during the continuance of the term, so as to give the shop a uniform appearance for the defendant's benefit, and that in pursuance of such agreement, and with plaintiff's consent, the show cases were put in:—Held, that the evidence of such agreement was not admissible, as it would add to the written agreement, and was not collateral thereto; but even if admissible; if it amounted to an easement or grant of an incorporeal right, it should have been under seal, and not being under seal, the license was a parol license, not incidental to a valid grant, and was revocable, and the fact that it was for consideration and for a term certain could make no difference. It was held also

that the evidence failed to establish the alleged agreement, and that the plaintiff was not stopped from denying it. *McKenzie v. McGlaughlin*, 8 O. R. 111.—C. P. D.

A mortgage was made by T. to W., who assigned it to M. No money was actually advanced on the mortgage by W., but before the said assignment to M., a parol agreement was come to between M. and T. that M. should hold the mortgage as security for a debt which T. owed to M. on a promissory note:—Held, that M. was entitled to hold the mortgage as security for the amount due him from T. *McIntyre v. Thompson et al.*, 6 O. R. 710.—Proudfoot.

The rule that a mortgage for a specific sum may be shewn to be for other purposes by parol evidence, is not confined to cases where the person having the legal estate is the original mortgagee whose claim has been paid off, and with whom the new agreement for security has been made. The same principle must apply whenever the legal estate becomes vested in the creditor by the agreement of the mortgagor as here. *Id.*

A conveyance was made by the plaintiff to the defendant for the expressed consideration of \$5,000. It was shewn by the evidence of the plaintiff and her two daughters, that the defendant in bargaining for the purchase of a lot of land, had agreed to give \$7,500 therefor, the defendant paying \$5,000 down and retaining in his hands \$2,500 to meet certain claims which he alleged were likely to be made against the property. This the defendant denied, but Proudfoot, J.; before whom the evidence was taken, was of opinion that the bargain was as sworn to by the plaintiff, and pronounced judgment giving her a lien for the \$2,500 and interest. On appeal this judgment was affirmed, *Burton, J. A.*, dissenting, and *Patterson, J. A.*, dubitante. Remarks as to the admissibility of parol evidence in such a case. *Marsh v. Hunt*, 9 A. R. 595.

Held, that the rule that the court will not interfere to rectify an instrument upon parol evidence, on the ground of mutual mistake, when the defendant denies that there was such mutual mistake, only applies where the defendant so denying was a party to the instrument in question. *Ferguson v. Winsor*, 10 O. R. 13.—O'Connor. See *S. C.* in appeal, 11 O. R. 88.

In an action of foreclosure of a certain mortgage of lands, the defence set up that the mortgage was given to secure a balance of purchase money for the land due from the defendant: that the plaintiff at the time of the purchase falsely represented that no one was in possession of the land, and that she could deliver immediate possession, which she agreed to do by a certain date, and the defendant was thereby induced to accept a conveyance (which was in the statutory short form) and give the mortgage: that as a matter of fact the land was at the time of such representations and for a long time after in possession of one L., and the plaintiff was unable to deliver up possession on the said date: that after the expiry of the said date the defendant threatened proceedings for breach of the plaintiff's agreement, and for the said misrepresentations, and the plaintiff in consideration that he would forbear the same, agreed with him that the times of payment under the mortgage should be postponed for a length of time equivalent to that

during which he would pay him, and that he did not occupy the premises no mortgage; which was proved:—Held, that the agreement to postpone payment could not be proved, or added to the written agreement of possession in account of the subsequent agreement, must be dismissed, counter-claimant, and to a decree. *Keays v. Ferguson*.

The plaintiff, by a lease under seal, leased to the defendant a shop, save and except the bottom portion of the east window, and save and except a portion of the shop described by metes and bounds. The defendant alleged that prior to his accepting the lease, and entering into the consideration for such acceptance, an independent and collateral parol agreement, separate and distinct from and not made part of the lease, was entered into, whereby the defendant was to have permission or license to remove certain shelving, &c., and to fit up the shop, including the portion reserved by the plaintiff, with handsome and ornamental show cases, during the continuance of the term, so as to give the shop a uniform appearance for the defendant's benefit, and that in pursuance of such agreement, and with plaintiff's consent, the show cases were put in:—Held, that the evidence of such agreement was not admissible, as it would add to the written agreement, and was not collateral thereto; but even if admissible; if it amounted to an easement or grant of an incorporeal right, it should have been under seal, and not being under seal, the license was a parol license, not incidental to a valid grant, and was revocable, and the fact that it was for consideration and for a term certain could make no difference. It was held also

2. *To Vary*

The plaintiff, by a lease under seal, leased to the defendant a shop, save and except the bottom portion of the east window, and save and except a portion of the shop described by metes and bounds. The defendant alleged that prior to his accepting the lease, and entering into the consideration for such acceptance, an independent and collateral parol agreement, separate and distinct from and not made part of the lease, was entered into, whereby the defendant was to have permission or license to remove certain shelving, &c., and to fit up the shop, including the portion reserved by the plaintiff, with handsome and ornamental show cases, during the continuance of the term, so as to give the shop a uniform appearance for the defendant's benefit, and that in pursuance of such agreement, and with plaintiff's consent, the show cases were put in:—Held, that the evidence of such agreement was not admissible, as it would add to the written agreement, and was not collateral thereto; but even if admissible; if it amounted to an easement or grant of an incorporeal right, it should have been under seal, and not being under seal, the license was a parol license, not incidental to a valid grant, and was revocable, and the fact that it was for consideration and for a term certain could make no difference. It was held also

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during which he was kept out of possession, and would pay him any damages sustained by him, and that he did so forbear, and by virtue of the premises no payment was yet due under the mortgage; which matters of defence being duly proved:—Held, that though the collateral parol agreement to deliver possession by a fixed date could not be enforced, because it contradicted or added to the short form covenant for delivery of possession in the deed of conveyance, yet on account of the said misrepresentations and the subsequent agreement, the plaintiff's action must be dismissed, and the defendant, having counter-claimed for damages, was entitled to the same, and to a reference to fix the amount thereof. *Keays v. Emard et al.*, 10 O. R. 314.—Ferguson.

The plaintiff had under several leases been in occupation of a farm of the defendant's for about 25 years. In consequence of the dwelling on the lot having become unfit for occupation by the lessee he notified the lessor of his intention to give up the premises at the end of his term. Thereupon it was agreed that the lessor would put up a new house, the plaintiff agreeing to accept a new lease for six years and pay an increase in his rent of \$150 a year. Plaintiff also agreed to perform some work in connection with the building in the summer of the first year of the term, and a written lease was executed containing a covenant by the lessor to build a new house "during the said term." The lessor insisted that he had the whole term within which to put up the house:—Held, [affirming the judgment of the Court below] that the circumstances attending the execution of the lease as also the corroboration afforded by the lease itself warranted the court in admitting parol evidence to shew that the first year of the term was the year in which the house was to be erected. Held, also, that even if the lease was meant to be silent as to the year for building, a reasonable time would be intended, and that the covenant of the plaintiff being to perform certain work on the building during the first summer of the term, and the increased rent being payable for the whole term then created, the first year must be considered reasonable. *Bulmer v. Brumwell*, 13 A. R. 411.

## 2. To Vary and Explain Other Writings.

### (a) Generally.

The plaintiffs in the beginning of January, 1880, had purchased through C. & G. of Montreal, a quantity of rails, and requiring 2000 tons more, negotiations were entered into between H., the plaintiff's agent, C. & G., and the defendant, which resulted in a note being signed on the 14th January, by C. & G. addressed to the defendant, advising him that they had sold to the plaintiffs on the defendant's account 2000 tons of rails (56 lbs. to the yard) at £8 18s. 9d. stg., per ton payment to be made in London against documents, and credit to be there opened with approved bankers in favour of defendant's agent. The defendant who was then in Montreal, signed a sale note in similar terms to the above. The sale was immediately communicated to the plaintiffs, who signed a confirmatory note, adding the words that the make should be either Ebbwvale or Moss Bay, and wrote across the face that the rails were to be 56 lbs. "ordinary section and specification."

This confirmatory note was not communicated to the defendant until after action brought. The credit was opened by the plaintiffs in accordance with the contract. The plaintiffs and defendant were dealers in, and not manufacturers of rails. The defendant, at the time the contract was entered into, had purchased rails from a firm in England, who were also dealers and not manufacturers, and who had arranged with the manufacturers at Ebbwvale, for the manufacture of rails of a section known as "Hamilton and North Western," and which came within the terms, "ordinary section," by which a number of different kinds of sections were embraced; and these were the rails which the defendant intended delivering to the plaintiffs. The plaintiffs required a section called "Sandberg," which also came within the term "ordinary section," and when they discovered the defendant's rails were Hamilton and North Western, they endeavoured to get defendant to change the section, which the defendant was unable to do. The plaintiffs allowed the rails to be shipped to them and paid for under the credit, and it was not till afterwards that they notified the defendant of their refusal to accept, contending that under the contract they had the right to name the section:—Held, that even if the confirmatory note were embraced in the contract, it did not give the plaintiffs the right of selection; that parol evidence was not admissible to add such a term to the contract; and that the evidence failed to establish any usage giving such right, especially as the parties were dealers and not manufacturers, and in view of the plaintiff's conduct in the matter, and that the contract was therefore performed by the section delivered. *Page et al. v. Proctor*, 5 O. R. 238.—C. P. D.

Held, that evidence of a parol agreement to extend for two years the time for the payment of a note payable on demand, was not admissible. Per Galt, J.—Even if the evidence was admissible, by the terms of the agreement, in this case, the time was to be suspended only on performance of certain conditions, which the defendant had failed to do, and therefore the plaintiff was entitled to enforce immediate payment. *Porteous et al. v. Muir et al.*, 8 O. R. 127.—C. P. D.

As to admissibility of extrinsic evidence to explain the capacity in which the maker signed a promissory note. See *Brown v. Howland*, 9 O. R. 48.

D. agreed to purchase certain lands as agent for K., and accordingly executed an agreement for the purchase of the same in her own name:—Held, that the evidence of D.'s agency was receivable though not in writing, and that no subsequent dealing of D., as by acquiring the legal estate, could operate to the disadvantage of K.:—Quare, whether *Bartlett v. Pickersgill*, 1 Cox. 15, 4 East 577, n. is still to be regarded as good law. *Kitchen v. Dolan*, 9 O. R. 432.—Boyd.

Defendant got from plaintiff six different sums of money, amounting together to \$3,000, for which he gave receipts. Three of these stated that defendant received so much money from plaintiff, "loan on oil, usual rate of interest." The remaining three were similar to the others, but concluded "payable within one year from date, with interest at 9 per cent. per annum." Defendant set up a parol agreement with plaintiff, by which defendant had the right at any

time to require plaintiff to take in payment of the moneys so lent the oil which defendant had in plaintiff's tanks at the market price at the time when defendant so required plaintiff to take the oil:—Held, that such a parol agreement could not be set up to alter the terms of the receipts which shewed such loans were to be repaid in money; and although the jury found the parol agreement to have been made, the court having all the facts before them set aside the verdict and judgment for defendant and directed judgment to be entered for the amount of the plaintiff's claim. *Lancey v. Brake*, 10 O. R. 428—Q. B. D.

Parol evidence is always admissible to shew the situation of the parties at the time the writing was made, the circumstances under which it was made, the time when it was made, and the relative trades of the respective parties:—Held, that the letters of the defendant, set out in the report and read together in the light of the parol evidence, constituted a sufficient note or memorandum in writing within the 17th sec. of the Statute of Frauds, and that parol evidence was also admissible to shew what the words "work" and "rig" used therein referred to. *Christie v. Burnett*, 10 O. R. 609—Q. B. D.

The plaintiffs agreed to sell to the defendants a waterwheel, "and place the same in position" for \$150, but the defendants refused payment upon the ground that the wheel had not been properly placed, and did not in fact, perform the work stipulated for. The jury found for the defendants, and the judge of the County Court granted a new trial—costs to abide the event. On appeal this court refused to interfere with the discretion of the judge of the court below, considering that the term "placed in position" was so indefinite that the defendant was at liberty to shew what was meant thereby; the writing, by such parol evidence not being added to or varied, but only rendered intelligible. *Harvis v. Moore, et al.*, 10 A. R. 10.

On motion to a Divisional Court (1) for a new trial on the ground that the findings were against evidence and for excessive damages, or (2) to enter judgment for defendant on the ground that the contract was in writing and therefore parol evidence of warranty was inadmissible. The Common Pleas Division refused a rule; and the defendant appealed as to the principal question, viz.: the admissibility of parol evidence:—Held, by Hagarty, C. J. O., and Rose, J., that parol evidence was properly admitted—that (as held in *Bennet v. Tregent*, 24 C. P. 565, approved of in *McMullen v. Williams*, 5 A. R. 518), it was a question of fact for the jury whether the written order embodied the whole contract, and therefore their finding on this point was conclusive. Held, by Burton, J. A., and Cameron, C. J., C. P., that parol evidence of a warranty was improperly admitted. Per Burton, J. A. (1) When a proposal is made in writing by one party and accepted *ad idem* by the other, either verbally or by acting upon it, the contract is a written one. (2) If the writing embodies the contract, the judge is bound to exclude all evidence to shew that the real intention of the parties was different from that which appears in the writing. (3) A warranty, though a collateral undertaking, is part of the contract of sale, and, if the contract is in writ-

ing, antecedent representations, not embodied in the written contract, are not warranties, and cannot be proved unless it is shewn that they were fraudulently made and the contract was so induced. (4) If the contract is not reduced to writing, or if, though there is a written document, the evidence leads the court to infer that the writing does not contain the whole agreement, it is for the jury to say whether antecedent representations did or did not amount to warranties. In this case there was no admissible evidence of a warranty, and the judgment should be for the defendant. *Ellis v. Abell*, 10 A. R. 226.

The plaintiff's agent at Gravenhurst shipped two car loads of shingles on defendant's cars. The shipping bill was in the usual form, and requested defendants to receive the undermentioned property, &c., addressed to N. Dymont (the plaintiff), Wyoming, to be sent subject to their tariff, &c. Then, in the appropriate columns, followed the description of a car load of shingles, giving the number of the car, &c. Then under this were the words, "To Henry James, Mitchell," and then another car load of shingles was described. Parol evidence was admitted at the trial to shew that the meaning of the shipping bill was that the first-named car load was to go to the plaintiff at Wyoming, and the other to Henry James, at Mitchell, and that the agent so told the defendants' station agent when shipping the goods:—Held, that the evidence was properly admitted. *Dymont v. The Northern and North-Western R. W. Co.*, 11 O. R. 343.—C. P. D.

The plaintiff bought the office and plant of a newspaper, gave a chattel mortgage thereon to W., and placed P. in charge. The defendants made advances to P. for the purpose of carrying on the business. W. sold the property by auction for the amount of the mortgage debt to the defendants, who, supposing that P. was the owner, wished to secure themselves for the advances made to him. The defendants then agreed to sell the property to the plaintiff; but a dispute arose as to the price, and this action was brought to obtain specific performance of the agreement. There was written evidence of the agreement to a document signed by the defendant Moore, part of which was as follows: "Price of this office to be what it has cost Mr. Horton (the other defendant) and myself." Specific performance was decreed by consent, and it was referred to the master at London to take the accounts, and to report what was the true agreement between the parties:—Held, [reversing the decision of the master and of Ferguson, J.] that the defendants had the right to shew before the master what they meant by the reference to the cost of the office as fixing the price; and that, upon the evidence, the true agreement between the parties was, that the price was to be the amount paid to W. plus the advances to P. *Hughes v. Moore et al.*, 11 A. R. 569.

A by-law to establish a road must, on its face, shew the boundaries of the road or refer to some document wherein they are defined; and the intention of the framers of the by-law cannot be ascertained by extrinsic evidence. *The Corporation of the Town of St. Vincent v. Greenfield*, 12 O. R. 297.—C. P. D.

The defendants in writing offered the plaintiffs to "furnish scows and deliver all the stone re-

quired for the require them, per cubic yard accepted "at the Held, reversing 9 O. R. 728, received to sh take place in river route over ried, was of su defendants to u scows. *McNe*

J. S. F. an owners of a lot ont any author sell to the pla purchase mon Brothers," the of his brothers course ran thro he expressly sti however, was receipt was ile refused to exec reserve the use F. S. swearing tioned any sale tion, and that t elected by J. S. been so reserve performance as cl foot, J., at the the brothers as ported to them ratified), and g plaintiff:—Held trial, that the e and there being antecedent or s the plaintiff's c missed, with co negotiations wit other persons l chase the lot b owners insisted to use the water whether the evi lateral in its n Tracey v. Fouch

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### XIII. PROOF.

#### 1. When D.

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See *McDonald*

quired for the Omemee bridge as fast as you require them, for the sum of seventy-five cents per cubic yard," which the plaintiffs in writing accepted "at the price and conditions named":—Held, reversing the judgment of the C. P. D., 9 O. R. 728, that parol evidence could not be received to shew that the delivery was only to take place in case the water, along the lake and river route over which the stone had to be carried, was of such a height as would enable the defendants to use their steamers in towing the scows. *McNeeley v. McWilliams*, 13 A. R. 324.

J. S. F. and his two brothers were joint owners of a lot of land which the former, without any authority from his brothers, agreed to sell to the plaintiff, and for a portion of the purchase money, signed a receipt "Fowlds Brothers," the name in which J. S. F. and one of his brothers carried on business. A water-course ran through the lot which J. S. F. swore he expressly stipulated should remain open, this, however, was denied by the plaintiff and the receipt was silent in respect to it. The owners refused to execute any conveyance which did not reserve the use of the water, the brothers of J. S. F. swearing that they never would have sanctioned any sale that did not make such reservation, and that they had only approved of the sale effected by J. S. F. on his statement that it had been so reserved. In an action for specific performance as claimed by the purchaser, Proudfoot, J., at the trial, rejected the evidence of the brothers as to the nature of the bargain reported to them by J. S. F., (and which they had ratified), and gave judgment in favour of the plaintiff:—Held, reversing the judgment at the trial, that the evidence was improperly rejected, and there being no authority to J. S. F. either antecedent or subsequent to bind his co-owners, the plaintiff's case failed and the action was dismissed, with costs. At or about the time of the negotiations with the plaintiff it was alleged that other persons had been endeavouring to purchase the lot but failed on the ground that the owners insisted on the reservation of a right to use the water:—Quere, per Hagarty, C. J. O., whether the evidence on this point was so collateral in its nature as to justify its rejection. *Tracey v. Fowlds*, 13 A. R. 115.

See also *Keays v. Emard et al.*, 10 O. R. 314; *Adamson v. Yeager*, 10 A. R. 477; *Foster v. Russell et al.*, 12 O. R. 136.

### XIII. PROOF BY SECONDARY EVIDENCE.

#### 1. When Documents must be Produced.

Under the circumstances shown in the evidence set out in the report:—Held, O'Connor, J., dissenting, that secondary evidence of the contents of the minute book of the company, shewing the making of certain calls, was improperly rejected. *Ross et al v. Machar*, 8 O. R. 417—Q. B. D.

Per Fournier and Henry, JJ. That as there was evidence that a certificate or report had been given by the engineer in this case oral evidence of the contents of the certificate or report was inadmissible. *The Corporation of the City of Quebec v. The Quebec Central Railway Co.*, 10 S. C. R. 563.

See *McDonald v. Murray*, 5 O. R. 559, p. 233.

#### 2. Proof of Deed by Memorial.

The production of a registered memorial executed by the grantee, where possession is not shewn to follow the deed, is not sufficient evidence in proof of the deed. Evidence in proof of a paper title in the defendant commented on. *Mulholland v. Harman*, 6 O. R. 546—C. P. D.

A memorial registered over sixty years, but executed by the grantee only:—Held, not sufficient secondary evidence of the deed to which it purported to relate, notwithstanding that conveyances had been made at early dates by persons claiming under the registered title, but who had not had actual possession of the land. *Van Velsor et al. v. Hughson*, 9 A. R. 390.

The land in question was one out of several lots mentioned in the memorial, which had been patented by the Crown to the grantor named in the memorial, and two others, as tenants in common. The memorial set out a grant of an undivided moiety of each lot described in it. Proceedings in partition had been taken in 1834 by the grantee against another tenant in common, in which the lot in question had been assigned in severalty to the grantee:—Held, that these proceedings did not, even in connection with the conveyances above mentioned, avail to make the memorial admissible as evidence of the deed:—Held, also, that it would not be made admissible by the fact that possession of some of the lands had gone in accordance with it, so long as there had been no such possession of the lands now in question; and that it was not aided in this respect by the Vendors and Purchasers Act, R. S. O., ch. 109. But held that the plaintiffs, who claimed only an undivided moiety of the lot under the grantee named in the memorial, while they could not recover in respect of the title of the grantor in that memorial, could nevertheless make title, by virtue of the judgment in partition, on the undivided interest of the patentee against whom the partition was had; that judgment being evidence against the last mentioned patentee of title to the whole lot. One of three patentees was not accounted for by the evidence, and it was not shewn that her title had devolved upon the others. The plaintiffs were therefore held entitled to recover only for one undivided third part of the land. *Ib.*

#### 3. Lost Documents.

A copy of an order and of a writ of execution issued pursuant thereto admitted in evidence, an official in the office where the same had been filed testifying that he had made the copies from the originals, which were proved to have been lost. *Wardrope v. The Canadian Pacific R. W. Co. et al.*, 7 O. R. 321.—Ferguson.

On a reference, H. sought to use a certain bill of costs as a voucher of moneys properly expended by him in legal proceedings, and it was shewn that the said bill had been properly brought into the master's office on a former reference and properly left there, and that search had been made for it, but without success, although there was no evidence that it had been removed, or that it had been noticed or seen elsewhere afterwards, nor of any occasion when it would probably have been removed from the office:—Held, that the master should have admitted secondary evidence

of its contents, and proceedings should have been taken in respect to it as nearly as might be the same as if H. had been able to produce it. *Beatty v. Hallan*, 10 O. R. 278.—Ferguson.

#### XIV. PROOF BY ENTRIES.

To determine a disputed boundary line between two lots, the field notes of S., a land surveyor, were offered in evidence, but objected to on the ground that they were not made by S. in the execution of his duty as such surveyor:—Held, that the objection was good, and the evidence inadmissible. *McGregor v. Keiller et al.* 9 O. R. 677.—Proudfoot.

Held, that a copied specification of the entry of a collector's measurements in the books of the supervisor, signed by the supervisor or his deputy under C. S. C. c. 46, s. 19, is receivable as evidence of such measurements. *Dobell et al. v. Ontario Bank et al.*, 9 A. R. 484.

A claim by the next of kin of a deceased legatee cannot be adjudicated upon in the absence of a personal representative of such legatee. But where entries had been made in the executor's books giving credit to such next of kin, for portions of such deceased legatee's share, such entries were held to be evidence of the relationship of debtor and creditor between such executor and next of kin, and could be read without entering into the consideration of the origin of the indebtedness. *Re Kirkpatrick—Kirkpatrick v. Sterenson*, 10 P. R. 4.—Hodgins, *Master in Ordinary*.

A memorandum or entry in a book in the office of a sheriff, in the handwriting of the deputy sheriff, purporting to be an entry of the receipt of a certain writ by the sheriff, admitted in evidence, subject to objection, the sheriff and the then deputy sheriff being dead, and the existing deputy sheriff having proved the handwriting and the place from which the book was produced. *Wardrope v. The Canadian Pacific R. W. Co. et al.*, 7 O. R. 321.—Ferguson.

#### XVI. HEARSAY EVIDENCE.

##### 1. In Questions of Pedigree.

Declarations made by the deceased mother of the plaintiff, in the hearing of the plaintiff and of the plaintiff's son, as to the marriage of the plaintiff's parents, received in evidence to prove the plaintiff's pedigree. *Walker v. Murray*, 5 O. R. 638.—Osler.

##### 2. Evidence of Reputation.

When certain persons sued as incumbents of certain rectories belonging to the Church of England in this Province, and it was objected that the constitution of the said rectories had not been legally proved:—Held, that evidence as to the possession or occupancy by the plaintiffs of their respective Churches, and as to their officiating according to the rules of the Church as persons having the cure of souls, and of their recognition by the Church Society or Synod, was admissible as some evidence of their status as such

rectors. *Langtry et al. v. Dumoulin et al.*, 7 O. R. 499.—Ferguson.

#### XVIII. EXPERT EVIDENCE.

As a rule the courts discountenance professional or quasi-expert evidence from being brought before them in writing. *The Attorney General v. Gooderham et al.*, 10 P. R. 259.—Boyd.

The evidence of professional draughtsmen was in this case,—Held, to have been properly admitted to shew what, according to the general practice and usage of draughtsmen in preparing plans, certain shadings and marks on said plans were intended to indicate. *Attrill v. Platt*, 10 S. C. R. 425.

On the trial of an issue, directed by the Surrogate Judge, before a jury, evidence was given as to the mental capacity of the testator by persons acquainted with him, the grant of probate being opposed by the widow on the ground, amongst others, of mental incapacity. The judge at the trial being of opinion that the witnesses examined were not of a class qualified to give scientific evidence as experts, withdrew the case from the jury, and gave judgment in favour of the plaintiffs, granting probate of the will, which he afterwards refused to set aside. On appeal a new trial was directed, and the costs of appeal ordered to be paid by the plaintiffs, it being held that the case should have gone to the jury, and that the opinions of such witnesses were clearly admissible, being of more or less value according to their skill, or experience or aptitude for judging of such matters, all which tests would be applied by the jury. *Regan et al. v. Waters*, 10 A. R. 85.

#### XIX. PRODUCTION AND ADMISSION OF EVIDENCE.

##### 1. Onus Probandi.

Action to set aside a conveyance obtained from an old woman who was deaf and unable to write, and who had no relatives or friends, by the reeve of the township in which she lived, and who was well known as a justice of the peace, and an active, shrewd business man engaged in many enterprises. The plaintiff was examined, and after giving evidence of the above facts, part of the defendant's depositions in the suit were put in, in which he admitted that she placed a good deal of confidence in him; she however having sworn in her evidence that she never placed any dependence on him. The plaintiff's case was closed, and it was contended that the onus was now on the defendant to show that the transaction was a righteous one. The defendant declined to call any witnesses, and plaintiff's action was dismissed:—Held, on motion for a new trial, sustaining the judgment of Proudfoot, J., that the onus was not on the defendant, and that the plaintiff must prove her case. Semble, the mere existence of confidence is not enough; influence must be proved, and is not to be presumed from the existence of confidence. *Willis v. Andrews*, 16 Chy. 637, followed. *McEwan v. Milne*, 5 O. R. 100.—Chy. D.

It is not sufficient for a party to any litigation on whom the onus is to say that he could furnish

the necessary proof in his duty to have produced, the mere being what the Bank of Canada v. Barnes, 7 O. R.

Where one brings a diversion of the flow from the channel more than 20 years, and was an artificial outlet, at the instance and owner of the creek, showed partly for had however on the fact, and so turned out:—Held, that the onus was on the plaintiff to shew in the mode of the admission. *Malcolm—Boyd*.

In an election Henry and Gwynne was on the appeal, objections had to the petitioner. and Taschereau, *Chette v. Goulet*,

In June, 1874, writing, entered together the iron way, and providing profits. No objection and the defendant from that enterprise plaintiff claimed which the defence that the onus of plaintiff rested failed to negative court declared his a reference to the parties. *Cameron—reversed by the Pr*

In an interpleader the proceeds of the sale of the plaintiffs' vessel. He put in and proved gave no evidence. On this the judge was no evidence refused to allow it after the plaintiff brought in a very motion to enter a new trial, it was a trial. Per Boyd proved enough to the defendant. The defendant shewed that goods passed from mortgagee before creditor should bring want of consideration would not mortgage was a to its purport. wife knew of the

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the necessary proof if he had certain papers. It is his duty to have these papers, or to have them produced, the means of causing their production being what the law deems ample. *Exchange Bank of Canada v. Springer—Same Plaintiffs v. Barnes*, 7 O. R. 309.—Ferguson.

Where one brought an action to restrain the diversion of the water which supplied his mill from the channel in which it had flowed for more than 20 years, and it appeared that the channel was an artificial cut, diverting the water from its natural outlet, and had been made originally at the instance and by the permission of the then owner of the creek in which the water naturally flowed partly for the benefit of the owner who had however on many occasions blocked up the cut, and so turned the water to its natural outlet:—Held, that such an occupation would not give a statutory right to the licensee, and that the onus was on the plaintiff to make out his right and shew that there had been a change in the mode of user after the origination by permission. *Malcolm et al. v. Hunter*, 6 O. R. 102.—Boyd.

In an election petition:—Held by Fournier, Henry and Gwynne, JJ., that the onus probandi was on the appellant, who by his preliminary objections had affirmed the disqualification of the petitioner. Contra—Ritchie, C.J., Strong, and Taschereau, JJ. *Megantic Election—Frette v. Goulet*, 8 S. C. R. 169.

In June, 1874, the plaintiff and defendant, by writing, entered into an agreement for supplying together the iron for the Grand Junction Railway, and providing for the division of the surplus or profits. No division of the profits was made and the defendant went on investing the receipts from that enterprise in other contracts, and the plaintiff claimed a like interest in them also, which the defendant denied his right to:—Held, that the onus of negating such right of the plaintiff rested on the defendant: and having failed to negative his right to such share, the court declared him entitled thereto and directed a reference to take the accounts between the parties. *Cameron v. Bickford*, 11 A. R. 52. Reversed by the Privy Council.

In an interpleader action to try the right to the proceeds of the goods sold by the sheriff one of the plaintiffs was a mortgagee of the goods. He put in and proved the chattel mortgage, but gave no evidence of a debt or of pressure used. On this the judge charged the jury that there was no evidence of a debt or of pressure, and he refused to allow the consideration to be proved after the plaintiffs closed their case. The jury brought in a verdict for the defendant. On a motion to enter a judgment for plaintiffs or for a new trial, it was held that there must be a new trial. Per Boyd, C.—The mortgagee plaintiff proved enough to cast the burthen of attack on the defendant. Proof of the mortgage duly executed shewed that the property and title to the goods passed from the judgment debtor to the mortgagee before the seizure. The execution creditor should displace this ownership by showing want of consideration or other reason. Suspicion would not justify the conclusion that the mortgage was a voluntary instrument contrary to its purport. There was no evidence that the wife knew of the husband's insolvency, and con-

curred with him in an attempt to gain a preference at the expense of the other creditors. Per Proudfoot, J.—The mortgage might be valid if given for a present advance of money for carrying on the business or other proper purpose, and insolvency would not be a circumstance shifting the onus of proof, and the production of the mortgage would be prima facie evidence; as the plaintiff, the mortgagee, appeared to have been misled, and was refused leave to supplement his evidence; a new trial should be granted to him. *Furlong v. Reid*, 12 O. R. 607.—Chy. D.

Per Hagarty C. J. O.—Where a corrupt practice is proved at an election trial, the onus is at once shifted to the respondent to bring himself within the saving clause. R. S. O. c. 10, s. 162. Prescott Election—Alexander v. Hagar, 1 E. C. 88 followed. *Muskoka and Pelly Sound Election—Pugot et al. v. Fauquier*, 1 E. C. 197.

In action of libel. See *Jackson v. Staley*, 9 O. R. 334.

Necessity of proving sale and arrears of taxes where title of purchaser at tax sale is put in issue. See *Sterenson v. Traylor*, 12 O. R. 804.

See also *Roan v. Kronsheim*, 12 O. R. 197; *Comtee et al. v. Canadian Pacific R. W. Co.*—*Canadian Pacific R. W. Co. v. Comtee et al.*, 11 P. R. 149; *McKenzie et al. v. Dancey et al.*, 12 A. R. 317.

## 2. Relevancy.

The plaintiff rented to the defendant a field for the purpose of growing flax at an agreed rental of \$10 an acre. In answer to the claim for rent, the defendant attempted to shew that he had sustained damage by reason of the ground being full of thistles, and that it had been stipulated that an allowance was to be made in such case, for the loss to the defendant:—Held, affirming the judgment of the County Court, that evidence was properly admitted for the guidance of the jury, in adjusting such allowance, as to how the defendant had himself settled with other persons who had thistles in their fields rented by him. *Weinhold v. Klein*, 10 A. R. 20.

See *Tracey v. Fowells*, 13 A. R. 115, p. 241. See also *Hickey et al. v. Stover et al.*, 11 O. R. 106; *Scougall v. Stapleton*, 12 O. R. 206.

## 3. In Reply.

The learned judge at the trial nonsuited, because he thought the agreement had not been properly proved, but allowed the case to go to the jury on the issue of fraud, the onus of which was on the defendants, and for assessment of damages. The defendant's counsel cross-examined one of plaintiff's witnesses on the question of fraud, and the plaintiff re-examined him upon the cross-examination:—Held, that by reason of such re-examination the plaintiff was not deprived of his right of calling witnesses in reply to the defendant's evidence of fraud, at all events this was a matter for the judge at the trial, and also the plaintiff having had to open the case, the fact of the case going to the jury only on the issue of fraud and for the assessment of damages, did not deprive the plaintiff of the right to reply. *McDonald v. Murray*, 5 O. R. 559—C. P. D.



A medical man called by the defendant stated, from the evidence given by the defendant, and the evidence given throughout the case, he could not say the defendant's treatment was bad surgery. The plaintiff proposed to call evidence in reply to shew from what defendant stated at the trial the treatment was bad surgery:—Held, inadmissible. *VanMere v. Farewell*, 12 O. R. 285—C. P. D.

#### 4. Other Cases.

At the close of the defence, the plaintiff's counsel, without objection, put in the defendant's examination before trial. The plaintiff's counsel, in addressing the jury, read a portion thereof; and the learned judge, in his charge, read other portions:—Held, there could be no objection to the learned judge reading such other portions, as they were properly in evidence. *Scougall v. Stapleton*, 12 O. R. 206—C. P. D.

Held, that a document which has not been proved nor produced at the trial cannot be relied on or made part of a case in appeal. *Lionais et al. v. The Molsons Bank*, 10 S. C. R. 526.

See *Clarke v. Union Fire Insurance Company—Chabot's Case*, 10 P. R. 413, p. 225; *Mowley v. Canada Atlantic R. W. Co.*, 11 P. R. 30, p. 229.

#### XX. CORROBORATIVE EVIDENCE.

W. D. B. alleged that in 1872, D. B. transferred to him as a gift 100 shares of a certain stock, part of the assets of the firm, and as corroborative evidence thereof proved the transfer of the stock to him, and a re-transfer afterwards on January 30th, 1873; which re-transfer, he said, was to prevent the surplus of the savings bank appearing to be less, and also produced the printed statement of the savings bank of December 31st, 1872, shewing this stock:—Held, that this was not such corroborative evidence of the gift as satisfied the statute R. S. O. c. 62, s. 10. *Burn v. Burn*, 8 O. R. 237.—Ferguson.

Plaintiff, after her husband's death, and about twenty-five years before action brought, went to live with testator, her son-in-law, and resided with him up to the time of his wife's death, about twelve years before action. She alleged that after her daughter's death, testator agreed to pay her wages if she would continue to live with him and take care of his family. She accordingly did so till his death in 1855, up to which date she had received nothing from him. In an action against his estate for wages plaintiff relied on the evidence of a witness to the effect that testator, about two years before his death, told witness plaintiff should be handsomely paid for her services; and also on the evidence of another son in law, that two or three years before his death testator told witness that he would pay her well. It also appeared that by his will testator directed all his property to be converted into money and invested in mortgage security, and the whole income paid to plaintiff during her lifetime; but there was no evidence as to the value of this bequest, and it was suggested that after payment of debts the residue would be very small:—Held, that there was no sufficient corroborative evidence within R. S. O. c. 62, s. 10. *Tucker v. McMahon et al.*, 11 O. R. 718—Q. B. D.

The evidence of various witnesses for the defence was conflicting as to the incidents which happened during this time and until the testator's decease; and while they all spoke of the testator's unwillingness to give the plaintiff more than \$10, there was no evidence, other than that of the defendant, of his desire to give her the bulk of his property or to make any disposition of it:—Held, reversing the judgment of Proudfoot, J., that the second will could not be established on the uncorroborated evidence of the defendant, and the prior will was declared to be the testator's last will. *Hogg v. Maguire*, 11 A. R. 507.

Remarks as to the application to civil causes of the practice in criminal cases regarding the corroboration of accomplices. *Re Monteith—Merchants' Bank et al. v. Monteith*, 10 O. R. 529—Chy. D.

Corroborating evidence of accomplice. See *Regina v. Andrews*, 12 O. R. 184.

In action for breach of promise of marriage. See *Costello v. Hunter*, 12 O. R. 333.

See *In re H. L. Lee*, 5 O. R. 583, p. 264.

#### XXI. CONTRADICTORY EVIDENCE.

Held, that, on the evidence as to the amount of wages, each party swearing to a different agreement, and the other evidence being contradictory, the fair inference was that the parties minds were never ad idem, and the recovery could only be on the quantum meruit. *Hocutt v. Merner et al.*, 7 O. R. 629—C. P. D.

Where the evidence is contradictory the court will not interfere with the findings of the judge who tried the case. *Cook et al. v. Patterson*, 10 A. R. 645.

Where there is a direct conflict of testimony, the finding of the judge at the trial must be regarded as decisive, and should not be overturned in appeal by a court which has not had the advantage of seeing the witnesses and observing their demeanour while under examination. *Graseth v. Carter*, 10 S. C. R. 107.

The learned judge who tried the case, in which the evidence was conflicting and irreconcilable, rested his conclusion in favour of the defendant on the documentary evidence and the probabilities arising in the case. This court, while not differing from the judge as to the credibility of the parties or their witnesses, having come to a different conclusion on the whole evidence, allowed the appeal, and reversed the decision of the court below. *Cameron v. Bickford*, 11 A. R. 52. Reversed by the Privy Council.

It is not as a general thing the best rule, in cases of varying opinion as to value, to reject one set of witnesses in toto and to adopt the figures of an opposing set. It is rather to be supposed that neither is exactly to be followed, and that truth lies somewhere between the extremes. *Munsie v. Lindsay et al.*, 11 O. R. 520.

#### EXAMINATION OF JUDGMENT DEBTOR

See ATTACHMENT OF DEBTS.

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## EXAMINATION OF PARTIES AND WITNESSES.

See EVIDENCE.

## EXECUTION.

## I. FIERI FACIAS (GOODS).

1. *What Amounts to a Seizure*, 249.
2. *Property Liable to Seizure*, 249.

## II. FIERI FACIAS (LANDS).

1. *Issue of*, 249.
2. *Property Liable to Seizure*, 250.

III. EXECUTION AGAINST MARRIED WOMAN—  
See HUSBAND AND WIFE.

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VII. APPLICATION OF STATUTE OF LIMITATIONS,  
251.

## VIII. PARTICULAR WRITS OF EXECUTION.

1. *Attachment*—See ABSCONDING DEBTOR.
2. *Capias*—See ARREST—CAPIAS AD SATISFACIENDUM.
3. *Sequestration*—See SEQUESTRATION.

IX. SHERIFF'S DUTY AND LIABILITY—See  
SHERIFF.

## X. IN DIVISION COURTS—See DIVISION COURTS.

XI. CREDITORS' RELIEF ACT—See CREDITORS'  
RELIEF ACT.XII. INTERPLEADER PROCEEDINGS—See INTER-  
PLEADER.

## XIII. DISTRESS—See DISTRESS.

## XIV. LANDLORD'S CLAIM FOR RENT—See SHERIFF.

XV. MALICIOUSLY ISSUING—See MALICIOUS  
ARREST, PROSECUTION, AND OTHER OFF-  
ENCES.

## XVI. POUNDAGE—See SHERIFF.

## I. FIERI FACIAS (GOODS.)

1. *What Amounts to a Seizure*.

See *Pardee v. Glass et al.*, 11 O. R. 275.

2. *Property Liable to Seizure*.

Shares of the stock of an incorporated company may be seized and sold under the Execution Act, R. S. O. c. 66, by a sheriff under a *fi. fa.* goods, and is entitled to an interpleader under sec. 10 of the Interpleader Act, R. S. O. c. 54, where an adverse claim to the stock is advanced. *Brown v. Nelson*, 10 P. R. 421.—*Dalton, Master*—Cameron.

See *Gunn v. Burgess*, 5 O. R. 685, p. 58.

## II. FIERI FACIAS (LANDS.)

I. *Issue of*.

Held, (affirming the judgment of Ferguson, J., 10 O. R. 215) following *Doe d. Spafford v. Brown*,

3 O. S. 95, and *Ontario Bank v. Kirby*, 16 C. P. 35, decided under 43 Geo. III. c. 1, that the issue of an execution against lands before the return of an execution against goods is, under R. S. O. c. 66, an irregularity only, and not a void proceeding, the provision of both statutes being in effect the same. *Ross v. Malone et al.*, 7 O. R. 397—Chy. D.

2. *Property Liable to Seizure*.

See *Hamilton Provident and Loan Society v. Gilbert*, 6 O. R. 434.

## IV. PRIORITY OF EXECUTIONS.

R. & E. were partners in business, and became financially involved. L., R. & Co. obtained a judgment against the firm for a firm debt, and placed the execution in the sheriff's hands, with a direction to levy of the goods of R. Subsequently the plaintiffs obtained a judgment against R. and E. individually and as members of the firm, and placed their execution in the sheriff's hands. The sheriff made the greater part of the amount of the plaintiff's execution out of the assets of the firm, and returned it "nulla bona" as to the residue, although, while the plaintiff's execution was in his hands, he had sold the furniture of R., being his individual property, and applied the proceeds upon the execution of L., R. & Co., which was first in his hands; and notwithstanding the plaintiffs' solicitor had notified him that the plaintiffs claimed the proceeds of the furniture as applicable to their execution only:—Held, (reversing the judgment of Proudfoot, J., 6 O. R. 644, Proudfoot, J., dissenting) that the plaintiffs could not recover against the sheriff for a false return; that the property of the individual partners was liable on a judgment against the firm; and that the plaintiffs were not entitled to priority over the first execution, because their judgment was against the partners as individuals as well as members of the firm. Per Proudfoot, J., the rule that the joint estate is for joint creditors, and the separate estate for separate creditors, is not confined to cases of bankruptcy and the administration of assets on the decease of a partner, and there are various ways in which the question may be raised in equity. Although it may be proper enough to give a creditor the benefit of his diligence, where the contest is between several creditors of the same debtor, with no equity arising from the nature of the property taken in execution, or from the nature of the rights involved, no such preference should be given where it works the injustice of depriving the separate creditor of the benefit of the property of his debtor. By the effect of the Judicature Act all distinction between legal and equitable debts and legal and equitable remedies is abolished. Debts of every kind are now recoverable in one forum, and the same forum enables creditors to reach every kind of assets, whether formerly legal or equitable, and the necessary result is, that the distinction between legal and equitable assets is at an end, and upon this subject the rules of law and equity being at variance, the latter are to prevail. *Bank of Toronto v. Hall*, 6 O. R. 653.—Chy. D.

The plaintiff was tenant in common with the defendants, and was proved to have received more than his proper share of the rent. The

defendants claimed against the plaintiff's share of the land, for the excess of the rent received by the plaintiff. There were executions in the sheriff's hands, and the execution creditors had come in under the decree in the cause:—Held, that the defendant's claim being simply for a debt for which an action might be brought, there was no actual charge until a judgment was obtained. That the execution creditors did not lose their priority by coming in under the decree, and were entitled to have it maintained. And that the case was not varied by some of the defendants being infants. *McPherson v. McPherson*, 10 P. R. 140.—Prondfoot.

See *Darling et al. v. Smith*, 10 P. R. 360, p. 3; *Robinson v. Bergin*, 10 P. R. 127, p. 2.

#### V. AMENDMENT OF EXECUTIONS.

An order was made by the Master in Chambers amending a judgment entered against C. as executrix, so as to make it a judgment against her personally; and also amending the writs of fi. fa. in the sheriff's hands so as to be conformable with the judgment as amended. The order was made nunc pro tunc upon the allegation that all parties interested had consented, and that an execution at the suit of the M. Co. against C. personally had expired. On an application made by the M. Co. to set aside the order, on the ground that their writ had not expired, but was in full force; and that the effect of the amendment was to give plaintiff's writ priority, the Master made an order setting aside his previous order, and directing the amendments made thereunder to be struck out. On motion by way of appeal to the Divisional Court to rescind the last named order:—Held, Cameron, C.J., dissenting, that the motion must be refused; for that though the M. Co., were strangers to the action in which the amendments were made, they had a locus standi to apply to have the same set aside. *Glass v. Cameron*, 9 O. R. 712—C. P. D.

#### VI. STAYING EXECUTIONS.

The plaintiff on the sale of certain lands to the defendant R., left in her hands a sum of \$200 of the purchase money as security against an execution in another action then in the hands of the sheriff against the plaintiff's lands. Subsequently the plaintiff appealed in that action, and on doing so gave a bond with sureties conditioned to pay the debt and costs:—Held, reversing the judgment of the court below, that the perfecting and allowance of such security operated as a supersedeas of the writ of execution, not as a stay thereof merely, and that the plaintiff was therefore entitled to recover the balance of the purchase money from R. *O'Donohoe v. Robinson et al.*, 10 A. R. 622.

#### VII. APPLICATION OF STATUTE OF LIMITATIONS.

Quere per Rose, J., whether there is any period fixed by the statute beyond which the court may not have the power to allow execution to be issued. *McCullough v. Sykes*, 11 P. R. 337.

### EXECUTORS AND ADMINISTRATORS.

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##### 5. Costs, 263.

#### IX. AS TRUSTEES—See TRUSTS AND TRUSTEES.

#### I. PROBATE AND LETTERS OF ADMINISTRATION.

##### 1. To Infant.

The 6th sec. of 38 Geo. III. c. 87 (Imperial Statute) prohibiting the grant of probate to infants under the age of 21 is in force in Ontario, either as a rule of decision in matters relating to executors and administrators (R. S. O. c. 40, ss. 34 and 35) or as a rule of practice in the Probate Court of England (R. S. O. c. 46, s. 32). An infant cannot lawfully be appointed administrator of an estate, and therefore a grant of probate or letters of administration to an infant is void, and confers no office on, and vests no estate in such infant. *Merchants Bank v. Monteith*, 10 P. R. 334.—Hodgins, Master in Ordinary.

#### II. RIGHTS, AUTHORITY, AND DUTY.

##### 1. Remuneration.

The order of Ferguson, J., 11 P. R. 272, reversed, and the Master's report restored. Held, that the right of an executor to compensation depends entirely upon R. S. O. c. 107,

##### 2. Mo

A testator charged his executors with the payment of his debts, and thereout as soon as his executors are

TRATORS. 41, and as that statute has fixed no standard, each case is to be dealt with on its merits, according to the discretion of the judge. The court, have laid down no inflexible rule in this regards and the adoption of any hard and fast commission (such as five per cent.) would defeat the intention of the statute:—Held, also, that there was no duty cast upon the petitioner which required him to act against the interests of his executor, nor did he incur any appreciable additional risk or responsibility, and he was therefore not entitled to a larger share of the commission awarded. *Re Fleming*, 11 P. R. 426—Chy. D.

G. W. by will directed his executors "to receive for their own use and benefit the sum of \$200 each, in lieu of all charges for their services in performing the duties imposed on them as executors of this my will."—Held, that under no circumstances could the executors who had accepted probate claim a larger sum than the amount specified as compensation for their services. *Denison v. Denison*, 17 Chy. 300, doubted:—Semble, that if an executor refused otherwise to act, and if it was found impracticable to deal with those entitled to the assets, the court could have jurisdiction to permit the compensation given by the statute to be awarded to him on condition of his relinquishing what was given to him by the will. *Williams v. Roy et al.*, 9 O. R. 534.—Boyd.

The taking of administration proceedings does not deprive executors of their functions or even suspend them, and a reasonable allowance should be made for moneys received *pendente lite*. *In re Honsberger*, *Honsberger v. Kratz*, 10 O. R. 521.—Boyd.

Executors claimed compensation in respect of receipts amounting to \$29,000, and of disbursements amounting to \$5,000. All the work of collecting and paying over was done after an order for administration had been made, and was done under the advice of solicitors, and in the more important matters under the direction of the Master. An item introduced on each side of the account was a transfer of mortgage to the plaintiff, amounting to \$4,684.47, which was carried out in pursuance of an agreement made by the solicitors and sanctioned by the Master. It also appeared that the plaintiffs solicitor collected and handed over to the executors \$2,400, and also made a payment to them of \$10,000 for which he was personally liable:—Held, that although the administration order did not put an end to the functions of the executors, yet it greatly diminished their responsibility, and it did so in this case to an almost vanishing point; and the compensation was reduced from \$1,193 to \$440, nothing being allowed in respect of the item of \$4,684.47, one per cent in respect of the items of \$2,400 and \$10,000, two and a half per cent. on the balance of the collections, and five per cent. on the disbursements except the transfer. *Thompson v. Fairbairn*, 11 P. R. 333.—Boyd.

See also *Burn v. Burn*, 8 O. R. 237.]

## 2. Mortgaging Property.

A testator charged his real estate with payment of his debts, which he directed to be paid thereout as soon as possible, and then devised it to his executors and trustees on trust to sell as

soon as they should think prudent, and invest the proceeds and pay an annuity to his widow until sale, and after the sale, invest a sum named from which to give her a specific annuity, and distribute the proceeds among his family; and proceeded: "Until sold as aforesaid, I direct that my trustees keep my schooners employed for freight and hire as far as possible, and for such purpose to engage all necessary assistants, and keep the said vessels in repair; and may store grain and other goods and merchandise in my warehouse for hire or storage; and may take such action as they think advisable to work and develop my interest in the B. gold mine, but the outlay by them shall not at any time exceed \$1000." The trustees became indebted to a bank for certain expenses incurred in connection with the schooners and repairs to them; and in connection with the warehouse, and to meet this indebtedness, executed a mortgage of the real estate to the plaintiffs who now brought this action for foreclosure. The testator's debts had all been paid before the execution of the mortgage, but there was no evidence that the plaintiffs knew more as to the purpose for which the money was required, than that it was to pay a debt due at the bank by the estate:—Held, reversing the judgment of *Ferguson, J.*, that the plaintiffs were entitled to the usual mortgage judgment, for there was no sufficient evidence of notice to them that the money was not to be expended in conformity with the will. *London and Canada Loan and Agency Company v. Wallace et al.*, 8 O. R. 539.—Chy. D.

The testatrix, by her will, devised and bequeathed all the rest and residue of her real and personal estate unto R. G., "upon trust to sell my real estate and to call in and convert into money the remainder of my personal estate, with power to demise or lease \* \* any portion thereof for any term or terms of years. \* \* And I declare that the said trustees shall, out of the moneys arising from such sale, calling in, and conversion \* \* pay off the incumbrance, if any, existing on the F. property, and shall divide the balance of the said moneys among my four children." The remaining property, not included in the residuary estate, was specifically devised by the will among the children of the testator in certain shares. R. G. mortgaged a certain portion of the residuary real estate to one T., and applied the proceeds of the loan in part in liquidation of the outstanding mortgage on the F. property, and in part otherwise for the benefit of the estate. The property comprised in this mortgage was sold by the court on proceedings by T., but did not bring enough to pay off the whole mortgage debt:—Held, on administration of the estate by the court, that the trust of the residue was a mere trust for conversion out and out, and R. G. had no power to make the mortgage in question, nevertheless to the extent to which the estate got the benefit of the loan, the executors of T. were entitled to rank against the estate for the balance of their mortgage debt, but only subsequent to certain mortgages placed by specific devisees since the death of the testatrix on portions of the estate devised to them, including the F. property, without knowledge, so far as appeared, of the source from which the money discharging the F. mortgage came:—Held, also, that the mortgage to T. being invalid, it could only carry interest at six

per cent., although it provided for interest at twelve per cent. *London and Canada Loan Co. v. Wallace*, 8 O. R. 539, distinguished. *Gordon et al. v. Gordon et al.*, 11 O. R. 611.—Proudfoot.

### 3. Repairs.

M. H. (the executrix under a will which was subsequently set aside), having expended \$536.35 in repairs to the real estate, and the testator's will having given her a life estate in all the real estate, and having also given her "the income of all investments of which I may be possessed for her own use, and also the principal of such investments as she may require to use for her own benefit;"—Held, that the \$536.35 was properly allowed to her. *Hill v. Hill*, 6 O. R. 244.—Ferguson.

### 4. Valuing Property.

A testator provided in his will that on the death of his widow, his executors should have his farm valued, and gave permission to his son E. to take it at their valuation, after which the proceeds were to be divided amongst all his children, of whom the executors were two. E. having made up his mind to take the farm, the executors called in his aid in nominating three valuers, and proceeded to value the farm, he being present, without notifying the other children. There was no evidence that he had attempted to influence the valuers, or that they had reached their conclusion in other than a legitimate and upright way, but certain of the children had impeached the valuation as being too low and asked for administration:—Held, that the executors who were exercising, in some sense, judicial functions, should either have excluded all interested, or should have invited all interested to take part in appointing valuers; that there should therefore be another valuation of the farm, and if the parties desired, it might be referred to the Master, or the executors might, on notice to all interested, proceed to do what was needful in that behalf. *Re Kerr, Kerr et al. v. Kerr et al.*, 8 O. R. 484.—Boyd.

### 5. Payment of Money into Court.

Payment of legacies to infants into Court. See *Re Parr*, 11 O. R. 301.

### 6. Other Cases.

By the third clause of her will, H. M. the testatrix, disposed of all her property, movables, and immovables, in favour of her children as universal legatees. The legacy was subject to the extended powers of administration conferred by the fifth clause of the will (referred to in the statement of the case), and also to the power to alter the disposition in favour of the testatrix's children given by the same clause to her husband H. L., the executor, and also by the will the executor was exonerated from the obligation of making an inventory and rendering an account. H. L., in his quality of testamentary executor and administrator to the estate of the said H. M., endorsed accommodation promissory notes signed by C. L., one of his children, and "The M. Bk." (respondent), as holder thereof for value, obtained

judgment against both the maker and endorser. An execution was subsequently issued against H. L., *ex qualitate*, and certain real estate of the late H. M., which he detained in his said capacity was seized and advertised for sale. J. D. L. et al. (the appellants), who are the only children of the defendant H. L., and his wife, opposed the sale of the property seized on the ground that the said property was insaisissable:—Held, reversing the judgment of the court below, Taschereau and Gwynne, JJ., dissenting, that the endorsements were not authorized by the will, and that the clause in the will, exempting the property of the testatrix from execution, is valid, and must be given effect to. Art. 972, C. C. *Liontis v. Molson's Bank*, 10 S. C. R. 526.

A testator by his will directed his executors to cancel and entirely release the indebtedness of his son W. S. upon and by virtue of a mortgage to the testator, such release to operate and take effect immediately on and from the said testator's death. In an action for the administration of the testator's estate, W. S. claimed the discharge of the mortgage, but the executors contended that they were not bound to give it until W. S. paid the amount of his other indebtedness to the estate. The master found in favour of the executors. On appeal from the master it was—Held, that the executors were not entitled to insist on payment of the other indebtedness before discharging the mortgage:—Held, also, following *Northey v. Northey*, 2 Atk. 77, that although at law the assent of the executor is necessary to the vesting of a specific legacy, in equity he is considered as a bare trustee, and if he refuse his assent without cause he may be compelled to give it, and that here the executors' refusal was without cause. *Archer et al. v. Seren et al.*, 12 O. R. 615.—Proudfoot.

See also *Re McDougall Trusts*, 11 P. R. 494; *Merchants Bank v. Monteith—Ex parte Standard Life Assurance Company*, 10 P. R. 588.

## III. LIABILITIES.

### 2. Devastavit.

An infant, whether executor or executor de son tort is not liable for a devastavit. Legacies directed to be paid out of a mixed residue are a charge on land. *Young v. Purves*, 11 O. R. 597.—Proudfoot.

### 3. For Interest.

It is not usual to allow interest on claims where there is no fraud, or wilful withholding of accounts, only a loose mode of dealing between the parties. The discretion in which a jury may allow interest applies to the Master's office. *Kirkpatrick—Kirkpatrick v. Stevenson*, 10 P. R. 4—Hodgins, Master in Ordinary.

The English rules regulating the award of interest against executors and trustees may be approximated in this Province (1) By charging an executor who negligently retains funds which he should have paid over or made productive for the estate, at the statutory rate of 6 per cent.; (2) By charging him who has broken his trust by using the money for his own purposes (though not in trade or speculation) at such a rate of interest as is the then current value of money; and

(3) By charging a trustee by embarking in trading adventures, at a rate of interest not exceeding the rate of interest on the notes and mortgages of the master charged per cent. per moneys in hand, and allowed the same on an appeal from the master's decision:—Held, that at 6 per cent., but interest was ordered in *Inglis v. Beane*, be upheld as being imposed on the *Housberger v. L.*

The executor's \$1,100 to meet were not called for that the amount and that the executor's interest in respect of 11 P. R. 333.—

See also *Croft v. R.* 159.

M. H. proved a subsequent will when the testator both physical and mental by S. H., the executor M. H. to set aside the second will, which M. H. was ordered to set aside. M. H., in an action with the executor's litigation in England, was entitled to the estate. *Hill v.*

Held, that an executor in his own estate he was not liable for the costs of such suits. 10 P. R. 334.—

The plaintiff was his brother in law and province of Ontario to give the necessary defendant W. his bondsmen, so that the estate placed in the portion of the estate railway stock which convert into money to assist them in doing of the estate in the land County, it was in the hands of several persons entitled

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(5) By charging him who makes gain out of his trust by embarking the money in speculative or trading adventures with the profits or with compound interest, as the case may be. The executors in this case kept considerable and constantly increasing balances in their hands from year to year, and allowed the acting executor to use the money as he pleased. It was not proved that any profit was made out of it, and no special evidence was given to shew what the current rate of interest during that period was; but the notes and mortgages held by the executors bore interest for the most part at 6 per cent. The master charged the executors with interest at 6 per cent. per annum, with annual rests upon moneys in their hands belonging to the estate, and allowed them the usual commission and costs. On an appeal from the report of the master, it was —Held, that the interest should be charged at 6 per cent., but that the awarding of compound interest was opposed to the spirit of the decision in *Inglis v. Beatty*, 2 A. R. 453, and could only be upheld as being in the nature of a penalty imposed on the executors. *In re Honsberger, Honsberger v. Kratz*, 10 O. R. 521.—Boyd.

The executors retained in their hands a sum of \$1,100 to meet claims against the estate, and were not called upon to pay it into court:—Held, that the amount retained was not unreasonable, and that the executors were not chargeable with interest in respect of it. *Thompson v. Fairbairn*, 11 P. R. 333.—Boyd.

See also *Crowter—Crowter v. Henman*, 10 O. R. 159.

#### 4. For Costs.

##### (a) Generally.

M. H. proved a will as executrix, afterwards a subsequent will was found dated about a time when the testator was in a weak state of health, both physical and mental. A suit was brought by S. H., the executor in the later will against M. H. to set aside the first and establish the second will, which was successful, and in which M. H. was ordered to pay the costs:—Held, that M. H., in an action for an account of her dealings with the estate, having a fair question for litigation in endeavouring to uphold the first will, was entitled to the costs thereof out of the estate. *Hill v. Hill*, 6 O. R. 244.—Ferguson.

Held, that an infant is incapable of bringing suits in his own name, or of making himself or the estate he assumed to represent liable for the costs of such suits. *Merchants Bank v. Monteith*, 10 P. R. 334.—Hodgins, *Master in Ordinary*.

The plaintiff wished to administer to the estate of his brother in the county of Westmoreland and province of New Brunswick, but was unable to give the necessary administration bond until the defendant W. and one J., agreed to become his bondsmen, securing themselves by having the estate placed in the hands of the defendants. A portion of the estate consisted of some English railway stock which the defendants wished to convert into money, but plaintiffs would not assist them in doing so. In passing the accounts of the estate in the Probate Court of Westmoreland County, it was found that there were several persons entitled to participate as next of

kin of the deceased, and the respective amounts due the several claimants were settled by the court. Owing to the plaintiff's refusal to join in realizing the stock, however, the defendants were unable to pay some of these parties their respective shares, and finally the plaintiff filed a bill to compel the defendants to pay him his portion of the estate, with \$1,000 which he claimed as commission, and also to hand over to him the shares of the next of kin. At the hearing, a decree was made directing the estate to be disposed of by the defendants, and that they were entitled to their costs, as between solicitor and client, which could be retained out of the plaintiff's share of the estate. On appeal, Proudfoot, J., reversed that portion of the decree which made the plaintiff's share of the estate liable for the defendants' costs; but the Court of Appeal (10 A. R. 76) restored the original judgment. On appeal to the Supreme Court of Canada:—Held, affirming the judgment of the court below, that as the misconduct of the plaintiff had caused all the litigation, the Court of Appeal had acted rightly in refusing to compel any of the other next of kin to bear the burden of the costs. *O'Sullivan v. Harty*, 11 S. C. R. 322.

#### 5. Other Cases.

Where a will creates a life estate in chattels, the executor is discharged when he hands over such chattels to the tenant for life. The tenant for life, and not the executor then becomes liable for them to the person entitled in remainder. *In re Mumse*, 10 P. R. 98.—Hodgins, *Master in Ordinary*.

The 57th and 58th sections of the Surrogate Act (R. S. O. ch. 46), protect parties bona fide making payments to an executor or administrator notwithstanding any invalidity in the probate or letters of administration, but they do not protect payments made to third parties by an infant assuming to act as administrator of the estate. *Merchants Bank v. Monteith*, 10 P. R. 334.—Hodgins, *Master in Ordinary*.

One L., by her will, gave her real and personal property to her brothers and sisters, share and share alike, and appointed L. and E. executors. L. and E. converted the estate into money, and invested the proceeds on mortgage security, and afterwards as certain of the legatees came of age paid them over their shares, but paid the plaintiffs' shares, they being infants, to one F. who, with the concurrence of their parents, had been appointed their guardian by the Surrogate Court. F. absconded with the money. The infants now suing L. and E. by their next friend for the amount of their shares:—Held, that by the actions of the executors the moneys in their hands had become trust funds of which they were trustees, and that the plaintiffs were entitled to judgment. *Huggins et al. v. Law et al*, 11 O. R. 565.—Ferguson.

See *Hayck v. Proctor*, 10 P. R. 25, p. 266. See also *Burn v. Burn*, 8 O. R. 237.

#### IV. DEFICIENCY OF ASSETS.

The effect of s. 30 of R. S. O. c. 107 is to disable an executor from giving preference to one credi-

The party who sells or gives the goods of a deceased person to another, but not the purchaser or receiver, is subject to the liability of an executor de son tort. The rule that where an executor takes the testator's goods on a claim

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# VIII. ADMINISTRATION SUITS.

## 1. When Granted.

C. M. died in 1869 entitled to real and personal estate, which by will he devised and bequeathed to his two illegitimate children D. & E., in the event of either dying, his share to go to the survivor, and he appointed C. executor and guardian of D. & E. who were infants. C. forthwith took possession of the estate and managed the same for the benefit of the infants. Both D. & E. died in 1871, D. surviving E. C. afterwards, also in 1871, paid off a mortgage outstanding upon the realty, and took a conveyance of the land from the mortgagee to himself in fee. On July 24th, 1880, the plaintiffs procured a grant from the Crown under the seal of this province, of real and personal estate of which D. died entitled, upon certain trusts therein set forth, and as such grantee, on October 20th, 1880, procured letters of administration to D.'s estate :—Held, that the plaintiffs as such administrators were entitled to an account of the defendant's dealings with the real and personal estate of C. M. :—Held, also, that although the original mortgagee might, under the circumstances, have become entitled to hold the mortgaged lands freed from the equity of redemption, yet that the defendant, standing in a fiduciary relation to the lands in question, could not set up the title acquired from the mortgagee adversely to the plaintiffs, but was a trustee thereof for the plaintiffs :—Held, also, that notwithstanding Attorney-General v. Mercer, 5 S. C. R. 538, the plaintiffs' right to an account as administrator of D.'s estate was not affected by the alleged invalidity of the grant to them of the escheated estate, and neither the cestui que trust named in the grant from the Crown, nor the Attorney-General for the Dominion were necessary parties :—Held, also, that the Statute of Limitations was no bar to the action. *Simpson v. Corbett*, 5 O. R. 377.—Ferguson. Affirmed on appeal, 5 S. C. 10 A. R. 32.

The jurisdiction in Chambers to grant administration orders, applies only to simple cases of accounts, and the Judge or Master in Chambers, may take the administration accounts in Chambers without referring them to the Master's office. But to all such references Chancery Order 220 applies. Where on an application for such order, it appears that there is a substantial and preliminary question to be decided, such question should be decided before the reference is ordered; and the Court may limit a time within which the parties may try the issue. But if the issue is not tried, or the order is made in Chambers without first directing such issue, the parties are held to have waived such preliminary question, and cannot raise it in taking the accounts under

such order in the master's office. *In re Mansie*, 10 P. R. 98.—Hodgins, *Master in Ordinary*.

Where a testator dies out of the jurisdiction of the court an administration order will not be granted, unless it is clearly shown that there are no personal assets here in respect of which ancillary letters probate could be obtained. An administration of the real estate only may be had in a very special case, but should be sought by action and not summary application. *Re Armour*—*Moore v. Armour*, 10 P. R. 448.—Boyd.

See *Re Morphy*—*Morphy v. Niven, et al.*, 11 P. R. 321, p. 263. See also *Burn v. Burn*, 8 O. R. 237.

## 2. Parties.

See *Re Monteith*—*Merchants Bank v. Monteith*, 11 P. R. 361, p. 264.

## 3. Practice.

The jurisdiction of the master's office is not co-extensive with that of the Court in enquiring into and adjudicating upon the validity of documents; and there is no authority to support any implied or assumed delegation of the functions of the court to the master. Nor is there any practice in the master's office which allows parties to obtain a reference to the master so as to evade the ordinary judicial functions of the court, and then invoke those judicial functions in a tribunal of delegated and subordinate jurisdiction. The plaintiffs when taking accounts before the master under the ordinary chamber order for the administration of personal estate, sought to have it declared that a bequest to K. who was one of the witnesses to the will, was valid :—Held, 1. That the master had no jurisdiction under such order and on oral pleadings to adjudicate upon the validity of the will; 2. That even if there was such jurisdiction, it could not be exercised in the absence of a personal representative of R.'s estate :—*Quere*, whether since *Ryan v. Devereux*, 16 Q. B. 100, such a bequest would be held to be invalid. *In re Mansie*, 10 P. R. 98.—Hodgins, *Master in Ordinary*.

In proceeding to take the accounts under an ordinary chamber order administration, certain unsecured creditors and the administrator sought to impeach the validity of certain warehouse receipts assigned to the plaintiffs by the testator in his lifetime, and on which he had received advances. On appeal from the master's ruling, it was held by Boyd, C., that as the court takes possession of the estate for the purposes of administration, the master's office possesses all the powers requisite for the administration of the assets, and had therefore jurisdiction to try the question. And that in the case of a creditor's administration reference, any creditor had a right to resist or attack the claims of any other creditor sought to be proved in the master's office. *Merchants Bank v. Monteith*, 10 P. R. 458.

An appeal from the order of the Master in Chambers changing the place of reference in an administration suit from Brantford to Walkerton, and giving the conduct of reference to the defendants, the executors, instead of the plaintiff, was dismissed with costs :—Held, that the

reference in administration actions should prima facie be to the place where the person whose estate is to be administered resides. *G. O. Chy. 638*, governs the case, and the practice laid down in *Macara v. Gwynne*, 3 *Chy. 310*, is inapplicable. *Thompson v. Fairbairn*, 10 *P. R. 533*.—*Boyd*.

During the argument before the master, and on the appeal the solicitor for certain of the defendants other than the executors asked for the conduct of the reference in the event of its being taken from the plaintiffs:—Held, that the solicitor could not obtain the conduct of the reference unless by a substantive application. The appeal was dismissed, without prejudice to a substantive application. *Id.*

A summary order was made for the administration of the personal estate of M. deceased. The order was not entered as a judgment, as it should have been by Rule 583, owing to a mistake of an officer of the court. The L. and C. L. and A. Co., who were execution creditors of one of the legatees and devisees of M., obtained an order appointing the company receiver of the share of the execution debtor, and served notice of this receivership upon the executors of M., but received no notice of the proceedings under the administration order. The company, however, were informed of the proceedings, and upon an ex parte motion procured the administration order to be properly entered as a judgment, and then applied for the carriage of the proceedings under it:—Held, that the status of the company was not that of assignee of the legatee, but only of a chargee or lienholder upon the fund or property to which the legatee was entitled; and therefore the company would not have been entitled in the first instance to ask in invitum for a summary order to administer; and the slip which was made in not having the order to administer properly entered did not give them any additional right in that respect; but notice of the proceedings should have been given to the company in order that they might be bound by what was done. *Re Morphy, Morphy v. Niven et al.*, 11 *P. R. 321*.—*Boyd*.

A receiver, appointed as the company were here, has a right to assert his claims actively, though he may require in some instances the sanction of the court; and a contention having been raised as to a forfeiture of the interest of the legatee, leave was given to the company to assert their claim by an action. *Id.*

#### 4. Effect of Decree.

Held, that a decree in an administration suit, although it may enure to the benefit of all creditors of an estate, does not prevent the Statute of Limitations from running against debtors to the estate. *Archer et al. v. Severn et al.*, 12 *O. R. 615*.—*Proudfoot*.

#### 5. Costs.

In an action for an account by a mortgagee, against the executors of a mortgagee who had sold the mortgaged premises under the power of sale in the mortgage, and who had also taken proceedings at law, a small balance of \$10 was found in his favour. Plaintiff having made cer-

tain charges which he failed to substantiate, and not having proved that an account was demanded and withheld from him; and certain special matter pleaded by the defendants being found against them:—Held, neither party entitled to costs. *Beatty v. O'Connor*, 5 *O. R. 747*.—*Boyd*.

Parties residing out of the jurisdiction who come into the master's office in an administration action pursuant to a notice to creditors, and claim to be creditors of an estate administered there, will be required to give security for costs. *Re Rees—Urquhart v. Toronto Trusts Company*, 10 *P. R. 425*.—*Holmes, Master in Ordinary*.

Held, that the executors were entitled to their costs, because the action was not occasioned by their misconduct; but they were disallowed the costs of such part of the enquiry as was caused by the misapplication of the funds or their failure to make reasonably accurate entries of their dealings with the estate. *In re Honsberger—Honsberger v. Kratz*, 10 *O. R. 521*.—*Boyd*.

The administrator is a necessary party to an administration suit, and as such should get his general bill of costs incurred in the ordinary proceedings in which he took part; but where an estate is insolvent, the creditors are the personally interested in the litigation, and it is for them, and not for the administrator, to take active steps by way of appeal to reduce the claims of secured creditors. The administrator is entitled to attend upon such appeals, and to tax a watching brief, but not such costs as if he were the principal litigant. *Re Monteith—Merchant Bank v. Monteith*, 11 *P. R. 361*.—*Boyd*.

In an administration suit in which the estate was insolvent, the total assets being \$72,000, the liabilities \$138,475, and the creditors 180 in number, and in which the commission of the solicitor who acted for all parties was allowed by the master, under *G. O. Chy. 643*, at \$895, eight creditors, at the close of the suit, and without notice to the solicitor until fourteen days before moving, applied for an order for the delivery and taxation of the solicitor's bill instead of the allowance of the commission, on the ground that the commission was excessive:—Held, that the commission was not so exorbitant as to warrant the substitution of a taxed bill, and a probable reduction by that mode of payment, especially as the benefit to the creditors would be trifling. *In re Stuebing—Anthes v. Devar*, 10 *P. R. 236*.—*Boyd*.

The scope of the *G. O. Chy. 643*, is merely to aid in fixing a solicitor's remuneration. It is not intended to do strict justice, but is only a sort of convenient expedient for fixing costs without taxation. *Id.*

A very liberal compensation in such cases is not per se a reason for reducing the commission, or directing the taxation of a bill in its stead, nor per contra is a low and inadequate compensation a reason for increasing the commission, or directing payment by a taxed bill. *Id.*

Seemly, that, in cases affected by this order, any party interested in the estate, who may desire that a solicitor should be paid in the particular matter or suit on the scale of a taxed bill instead of by commission, should give notice to the solicitor to that effect, and have the master note it in his book, at the earliest stage possible in the

proceedings; the substitution at the option

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Right to the conduct of the *Express Company*, 9 *O. R. 2*

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I. BY MURPHY FORA

II. BY RAILWAY

Compensation of appropriation of ment. See *Re Street*, and "687.

In extradition charged that the suspect and believed that H. L. Lee the crime of for H. L. Lee, & 78 orders for the charge was, the said several times knowing the said orders, &c. — Information charged, falsely forged, informant believed, ed," &c., might even if objection under s. 11 of 33 Vict. c. 29, s. 1 charge was free

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proceedings ; but there is no practice authorizing the substitution of a bill of costs for commission at the option of any party. *Ib.*

### EXECUTOR DE SON TORT.

*See* EXECUTORS AND ADMINISTRATORS.

### EXECUTORY DEVISE.

*See* WILL.

### EXPERT EVIDENCE.

*See* EVIDENCE.

### EXPRESS COMPANY.

Right to the facilities afforded by railways in the conduct of their business. *See The Vickers Express Company v. The Canadian Pacific R. W. Co.*, 9 O. R. 251, 13 A. R. 210.

### EXPLOSION.

*See* INSURANCE.

### EXPROPRIATION OF LAND.

I. BY MUNICIPALITIES—*See* MUNICIPAL CORPORATIONS.

II. BY RAILWAYS—*See* RAILWAYS AND RAILWAY COMPANIES.

Compensation claimed by municipality for expropriation of roads by the Dominion Government. *See Re Trent Valley Canal*, *Re Water Street*, and *The Road to the Wharf*, 11 O. R. 687.

### EXTRADITION.

In extradition proceedings the information charged that the informant "hath just cause to suspect and believe, and doth suspect and believe that H. L. Lee, the prisoner, "is accused of the crime of forgery," &c., "for that the said H. L. Lee," &c., "did feloniously forge" some 78 orders for the payment of money. The 79th charge was, that the said H. L. Lee, at the aforesaid several times, &c., did feloniously utter, knowing the same to be forged, the said several orders, &c. :—Held, sufficient, for that the information charged that the prisoner "did feloniously forge," &c. ; and the allegation that the informant believed that the prisoner "is accused," &c., might be treated as surplusage ; but even if objectionable at common law, it was good under s. 11 of 32 & 33 Vict. c. 30, (Dom.) and 32 & 33 Vict. c. 29, s. 27, (Dom.) ; and moreover the 79th charge was free from objection. —Held, also, that

in these proceedings, a plea to the information is not required. *In re H. L. Lee*, 5 O. R. 583—C. P. D.

Certain foreign depositions used were sworn to before E. G., a justice of the peace for Cincinnati township, Hamilton county, Ohio. A certificate was attached, commencing, "I, Daniel J. Dalton, clerk of the Court of Common Pleas for said Hamilton county," certifying as to the signature of E. G., and that he was a duly qualified justice of the peace for said county, and entitled to take depositions of witnesses, &c. ; and concluded, "In testimony whereof I have hereunto set my hand and affixed the seal of the said Court at Cincinnati," &c. D. J. Dalton, by Richard C. Rohner, Deputy. To this was attached the certificate of the Governor of the State of Ohio, under the great seal of the State, certifying that D. J. Dalton, "whose genuine signature and seal are affixed to the annexed attestation, was at the date thereof clerk of the said Court," &c. ; that "he is the proper person to make such attestation, which is in due form, and that his official acts are entitled to full faith and credit." The court, without specially pronouncing on the question, refused to allow an objection, which as a matter of fact was not taken, to the sufficiency of the depositions under 45 Vict. c. 25, s. 9, sub-s. 2(a) (Dom.), for the official seal of D. J. Dalton is attached, and the Governor certified that he was the proper person to make such attestation ; and also there was viva voce evidence given in proof thereof, so that the "papers were authenticated by the oath of some witness" under sub-s. (b). Per Wilson, C. J. In these proceedings the evidence of interested parties need not be corroborated. *Ib.*

### FACTUM.

The plaintiff's factum, containing reflections on the Judge in equity, and the full court of New Brunswick, was ordered to be taken off the files of the court as scandalous and impertinent. *Vernon v. Oliver*, 11 S. C. R. 156.

### FALSE IMPRISONMENT.

*See* MALICIOUS ARREST, PROSECUTION AND OTHER PROCEEDINGS.

### FALSE REPRESENTATION.

*See* FRAUD AND MISREPRESENTATION.

### FATHER AND SON.

*See* PARENT AND CHILD.

### FELONY.

I. GENERALLY—*See* CRIMINAL LAW.

II. SUSPENSION OF ACTIONS IN CASES OF FELONY—*See* ACTION.

## FEME COVERT.

See HUSBAND AND WIFE.

## FENCES.

RAILWAY FENCES—See RAILWAYS AND RAILWAY COMPANIES.

## FERRY.

The crown granted a license to the town of Belleville, giving the right to ferry "between the town of Belleville to Ameliasburg"—Held, a sufficient grant of a right of ferriage to and from the two places named. *Anderson v. Jellet*, 9 S. C. R. 1.

Under the authority of this license the town of Belleville executed a lease to the plaintiff granting the franchise "to ferry to and from the town of Belleville to Ameliasburg," a township having a water frontage of about ten or twelve miles, directly opposite to Belleville, such lease providing for only one landing place on each side, and a ferry was established within the limits of the town of Belleville on the one side, to a point across the bay of Quinte, in the township of Ameliasburg, within an extension of the east and west limits of Belleville. The defendants established another ferry across another part of the bay of Quinte, between the township of Ameliasburg and a place in the township of Sidney, which adjoins the city of Belleville, the termini being on the one side two miles from the western limits of Belleville, and on the Ameliasburg shore, about two miles west from the landing place of the plaintiff's ferry.—Held (reversing the judgment appealed from, 7 A. R. 341), that the establishment and use of the plaintiff's ferry within the limits aforesaid for many years had fixed the termini of the said ferry, and that the defendants' ferry was no infringement of the plaintiff's rights. *Id.*

## FIERI FACIAS.

See EXECUTION.

## FIRE.

I. CLEARING LAND, 267.

II. CARRIAGE OF GOODS, 268.

III. FROM STEAMBOATS—See SHIP.

IV. FROM RAILWAY ENGINES—See RAILWAYS AND RAILWAY COMPANIES.

V. INSURANCE AGAINST—See INSURANCE.

## I. CLEARING LAND.

The defendant, for the purpose of clearing his land, set out fire on the same, but before doing so consulted with the plaintiff, who had some lumber piled on an adjoining lot, and who agreed that the weather was favourable, the wind blowing in a direction away from the plaintiff's pro-

perty, and to prevent it spreading thereto the defendant burnt out the stubble etc. around the plaintiff's property. The fire was set out on Monday, the wind continuing in the same direction on Tuesday and Wednesday, and in the interval there were falls of rain, in consequence of which the defendant did not keep watch over the fire. On Thursday morning there were indications of a change of wind, and the defendant sent his son to watch the fire, but when the latter arrived on the ground the wind was blowing a heavy gale, at the rate of from thirty-five to forty miles an hour, and the fire communicated to the plaintiff's property, which was destroyed, and it appeared that even if the defendant had been watching he could not have prevented the fire spreading.—Held, that the defendant was not liable for the damage sustained by the plaintiff. *Murphy v. Dalton*, 5 O. R. 541.—C. P. D.

## II. CARRIAGE OF GOODS.

See *Brodie v. The Northern R. W. Co.*, 6 O. R. 180.

## FIRE INSURANCE.

See INSURANCE.

## FISHERY.

Three several actions for trespass and assault were brought by A. B. and C., respectively, riparian proprietors of land fronting on rivers above the ebb and flow of the tide, against V., for forcibly seizing and taking away their fishing rods and lines, while they were engaged in fly-fishing for salmon in front of their respective lots. The defendant was a fishery officer, appointed under the Fishery Act (31 Vict. c. 60), and justified the seizure on the ground that the plaintiffs were fishing without license in violation of an order-in-council of June 11th, 1879, passed in pursuance of section 19 of the Act, which order was in these words:—"Fishing for salmon in the Dominion of Canada, except under the authority of leases or licenses from the Department of Marine and Fisheries, is hereby prohibited." The defendant was armed and was in company with several others, a sufficient number to have enforced the seizure if resistance had been made. There was no actual injury. A. recovered \$3,000, afterwards reduced to \$1,500 damages; B. \$1,200; and C. \$1,000.—Held, that sections 2 and 19 of the Fisheries Act, and the order-in-council of the 11th of June, 1879, did not authorize the defendant in his capacity of Inspector of Fisheries, to interfere with A. B., and C.'s exclusive right as riparian proprietors of fishing at the locus in quo; but that the damages in all the cases were excessive, and therefore new trials should be granted.—Held, also (Gwynne, J., dissenting), that when the defendant committed the trespasses complained of, he was acting as a Dominion officer, under the instructions of the Department of Marine and Fisheries, and was not entitled to notice of action under C. S., N. B., c. 89, s. 1, or c. 90, s. 8. *Venning v. Steadman*, 9 S. C. R. 206.

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313.

## FIXTURES.

H. H. S. gave a mortgage to R. to secure a  
past debt and future advances, in which it was  
recited that security was to be given "by the  
lands hereinafter mentioned, and also by the  
machinery hereinafter mentioned," and which  
proceeded to mortgage the said lands, "together  
with the machinery and foundry apparatus now  
in use and that may in future be used in the  
brick and frame buildings situate on the said lots,  
used as a machine shop and a foundry down-  
stairs, and as a printing office upstairs, the ma-  
chinery being composed of one printing press,  
&c., (describing various articles of machinery,) together with all the machinery now in or that  
may hereafter be put in the said premises." In  
the proviso in the mortgage the property was  
described as "lands and chattels." The mort-  
gage was registered, but was not filed as a chattel  
mortgage, nor was there change of possession :—  
Held, that the above was, in effect, a mortgage  
of the machine shop and foundry, and of the  
printing office, as going concerns, not of the land  
as such and chattels as such, and had the same  
force and effect as if these had been mortgaged,  
naming them :—Held, therefore, that certain  
articles in question in this action, which were at  
the time of the execution of the mortgage on the  
premises, and were essential parts of the going  
concerns, passed under the mortgage :—Held,  
also, following *Kitching v. Hicks*, 6 O. R. 739,  
that the mortgage was in any event good without  
registration as a chattel mortgage, so far as it  
was a mortgage upon property brought upon the  
premises after its date. *Robinson et al. v. Cook*,  
6 O. R. 590.—Ferguson.

T., being liquidator of a company which was  
being wound up sold the manufactory to H. for  
\$9,000, part in cash and the balance secured by  
a mortgage on the premises. At the time of the  
sale there was an engine, boiler, pulleys, &c.,  
among the machinery on the premises, but no  
mention of them was made in the mortgage. H.  
afterwards undertook to sell the engine, boiler,  
and pulleys, but T. objected until assured that  
they would be replaced by better machinery.  
H. purchased from I. and H., the defendants,  
another engine, boiler, shafting, hangers, and  
pulleys to replace the old ones, paying part in  
cash, and securing the balance by notes, under  
a written agreement, which stipulated that  
the property should not pass to H., but was to  
remain in I. and H. until the full payment  
of the price, and of any obligations given there-  
for, but H. was to have possession at once, and  
to use the same until default in payment \* \*  
when I. and H. might resume possession. The  
engine and boiler were placed upon a stone  
foundation and bricked over in a building on  
the premises other than that from which the  
old ones had been removed. They could be re-  
moved by taking down a part of the wall of the  
building in which they were placed, and without  
injury to the old building; but were so affixed  
to the realty as under ordinary circumstances to  
become a part of it. H. failed, assigned his estate

for the benefit of his creditors, and made default  
in payment, and I. and H. began to remove the  
machinery. In an action brought by T. for an  
injunction restraining the defendants I. and H.  
from such removal :—Held, that the express  
agreement between H. and the defendants that  
the property in the machinery should not pass  
from the defendants to H. until paid for, and  
the intention with which the articles were affixed,  
must govern : and that the machinery therefore  
did not become part of the realty or pass to the  
plaintiffs. *Thomas v. Inglis, et al.*, 7 O. R. 588.  
—Proudfoot.

Held, that under the statutory covenant to  
repair, the tenant was bound to keep in repair  
not only the demised premises, but also implicitly  
all fixtures and things erected or made during  
the term which he had a right to erect or make :  
that the right to erect such fixtures is to this  
extent, viz., that they shall not be such as to  
diminish the value of the demised premises, nor  
to increase the burden upon them as against the  
landlord, nor to impair the evidence of title. The  
plaintiff's reversion not being injured by the acts  
complained of, there was no waste and no forfeit-  
ure. *Holderness v. Lang*, 11 O. R. 1—Q. B. D.

O. & K. under a verbal agreement with an  
agent of the Canada Company (which that com-  
pany refused to adopt) entered into possession of  
land belonging to the latter, and erected a steam  
mill thereon. They procured from the plaintiffs  
an engine, boiler, &c., under an agreement that  
the property therein should not pass to the ven-  
dees till paid for. They exchanged the plaintiff's  
boiler for another made by one D., which they  
put up with the plaintiff's engine. This coming  
to the knowledge of the plaintiffs they seized  
their own boiler, in consequence of which O. &  
K. on the 27th November, 1883, executed to the  
plaintiffs a chattel mortgage on the "D." boiler.  
Prior to this date, however, and on the 12th of  
the same month O. & K. executed a mortgage on  
the said lands and premises to the defendant,  
to whom they were indebted, and three days  
later as a matter of precaution and as part of the  
same bargain they executed a chattel mortgage  
in his favour as further security for a debt due  
him (net naming any amount), and assigned all  
and singular certain goods, &c., viz. : "One mill  
and machinery, one frame house \* \* two  
bay horses," &c. This security by reason of de-  
fects under the Chattel Mortgage Act was void  
as against the plaintiff's claim. Prior to the  
commencement of this action the defendant ob-  
tained from the Canada Company a deed of the  
land in question. On appeal to this court it was :—  
Held, (in this reversing the judgment of the  
court below, 9 O. R. 692), that although O. &  
K. had not any interest in the land on which  
they had so erected their mill, and placed their  
machinery, yet by their mortgage the "D."  
boiler and other fixtures not originally purchased  
from the plaintiffs, passed to the defendant, as  
part of the realty; such mortgage unlike that of  
the chattels not requiring registration to give it  
validity :—Held, also, that the defendant might  
support his title under the deed from the Canada  
Company; the boiler having been affixed to the  
land and passing under the deed as part of the  
realty. Per Patterson, J. A.—No difficulty ex-  
isted in supporting the defendant's title under  
either of his own mortgages, or under the con-

veyance from the Canada Company. *Stevens v. Barfoot*, 13 A. R. 366.

Trade fixtures. See *The Joseph Hall Manufacturing Company v. Hazlett et al.*, 8 O. R. 465.

FLOATING TIMBER.  
See WATER AND WATER COURSES.

FORECLOSURE.  
See MORTGAGE.

FOREIGN CONTRACT.  
See INTERNATIONAL LAW.

FOREIGN CORPORATIONS.  
See CORPORATIONS.

FOREIGN DIVORCE.  
See HUSBAND AND WIFE.

FOREIGN JUDGMENT.  
See JUDGMENT.

FOREIGN LAW.  
See INTERNATIONAL LAW.

FOREIGNER.  
SECURITY FOR COSTS BY—See COSTS.

Trustee for infants. See *Re Andrews*, 11 P. R. 199.

FORFEITURE.  
I. FOR BREACH OF COVENANT.—See COVENANT.  
II. OF LEASE.—See LANDLORD AND TENANT.

Of condition in bond. See *Corporation of the Village of Brussels v. Romsh*, 11 A. R. 605.

FORGERY.  
See CRIMINAL LAW.

Of bills of exchange and promissory notes. See *Ryan v. The Bank of Montreal*, 12 O. R. 39; *The Merchants' Bank of Canada v. McKay et al.*, 12 O. R. 498.

## FORMER RECOVERY.

See JUDGMENT.

## FORMS.

Remarks on forms prescribed in various cases by Acts of Parliament. *Gemmell v. Garland*, 12 O. R. 139.—Boyd.

## FRAUD AND MISREPRESENTATION.

### I. IN SALE OR CONVEYANCE OF LAND.

1. *Improvidence*, 272.
2. *Undue Influence*, 273.
3. *Fraud or Misrepresentation as a Ground of Action or Defence*, 274.
4. *Specific Performance of Contract*—See SPECIFIC PERFORMANCE.

### II. OTHER CONTRACTS.

1. *Generally*, 278.
2. *Actions for Deceit or False Representation*.  
(a) *Evidence*, 279.  
(b) *Other Cases*, 279.
3. *By Promoters of Companies*—See CORPORATIONS.

### III. MISCELLANEOUS CASES, 281.

### IV. FRAUD AND ILLEGAL CONSIDERATION IN BILLS AND NOTES—See BILLS OF EXCHANGE AND PROMISSORY NOTES.

### V. FRAUDULENT CONVEYANCES—See BANKRUPTCY AND INSOLVENCY—FRAUDULENT CONVEYANCES.

### VI. FRAUDULENT JUDGMENTS—See FRAUDULENT JUDGMENT.

### VII. IN INSURANCE—See INSURANCE.

### VIII. FOLLOWING MONEY FRAUDULENTLY OBTAINED—See MONEY.

### I. IN SALE OR CONVEYANCE OF LAND.

#### 1. *Improvidence*.

On August 30th, 1875, the plaintiff, an illiterate man, over 75 years old, voluntarily conveyed his farm to the defendants, his sons. On the same day the defendants leased the farm to the plaintiff for the term of his natural life, reserving no rent. On 23rd September, 1875, the plaintiff leased to D., one of the defendants, but for the benefit of both, the said farm for the term of his, the plaintiff's, life, reserving a rent of \$100 a year, and "the proper board, clothing, and lodging" of the plaintiff "so long as he remains on the premises," and by the same deed transferred to D. all the goods and chattels on the farm. The defendants, thereupon, went into possession of the farm, on which the plaintiff also continued to reside, and before action brought had built a house on it, and made sundry improvements:—Held, that upon the evidence set out in the case, the grant of August 30th, 1875, and the lease of 23rd September, 1875, must be set aside on grounds of improvidence, and want of proper professional advice:—Held.

however, the defendants had the lease of the plaintiff, yet granted upon repaid all the repairs of a by which the hanced, with were actually by them to be mortgage, w since its orig any principa also of the de to the plaint nance as he l on the other l el with deter provements, kinds receive rent, and also tioned in the plaintiff. *Sh Ferguson*.

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however, that though it appeared that the defendants had made serious default in regard to the lease of 23rd September, 1875, and had been guilty of violence and ill-treatment towards the plaintiff, yet the above relief could only be granted upon the terms of the defendants being repaid all sums expended in improvements, and repairs of a permanent and substantial nature by which the present value of the farm was enhanced, with interest from the time these sums were actually disbursed; also the moneys paid by them to keep down the interest of a certain mortgage, which had existed on the farm ever since its original purchase by the plaintiff, and any principal moneys thereof paid by them; also of the defendant D. being repaid rents paid to the plaintiff, and the value of such maintenance as he had given to the plaintiff, but that on the other hand, the defendants must be charged with deterioration, to be set off against improvements, and with rents and profits of all kinds received by them, and with an occupation rent, and also with the value of the chattels mentioned in the lease, and given up to them by the plaintiff. *Shanagan v. Shanagan*, 7 O. R. 209—Ferguson.

Where a railway company contracted for the purchase of certain land with B., a married woman, in the absence of her husband:—Held, that the company were under no obligation to see that B. had independent advice in the matter; and inasmuch as the price seemed not to be grossly inadequate, and B. appeared to be fully compos mentis, and no unfair advantage having been taken of her, the agreement could not be set aside. *Bryson et al. v. The Ontario and Quebec R. W. Co. et al.*, 8 O. R. 380.—Ferguson.

If two persons, no matter whether a confidential relationship exists between them or not, stand in such a relation to each other that one can take an undue advantage of the other, whether by reason of distress, or recklessness, or wildness, or want of care, and when the facts shew that one party has taken undue advantage of the other by reason of the circumstances mentioned, a transaction resting upon such unconscionable dealing, will not be allowed to stand:—Held, therefore, in the present case, affirming the decision of Osler, J. A., it appearing upon the evidence in the report, that the plaintiff being overmatched and overreached by the defendant, without information and without advice, had made a most improvident exchange of certain real and personal property of his own for certain real and personal property of the defendant—the plaintiff was entitled to have the transaction rescinded; that the plaintiff's general condition of ignorance, his want of skill in business, and his comparative imbecility of intellect, were such as to require the court to deliver him from the disadvantages of a transaction which he would not have entered into had he been properly advised and protected. *Waters v. Donnelly*, 9 O. R. 391—Chy. D.

See also *Gough v. Bench*, 6 O. R. 699.

## 2. Undue Influence.

In an action to restrain waste it was shown that the plaintiff obtained from his father a deed of the premises in question, the father swearing that he supposed when executing the document

that it was his will he was making, and the conveyancer who prepared the deed admitted in his evidence that he might have suggested to the subscribing witness to the deed not to talk too much to the old man about the writing, as perhaps he would not sign it; and the deed as prepared was silent altogether as to certain provisions and payments that were to be made as alleged by the plaintiff. The court reversed the decree pronounced by the court below (6 O. R. 141), directing the deed to be reformed; and ordered the bill to be dismissed, with costs, and the deed to be delivered up to be cancelled. *Dunlop v. Dunlop et al.*, 10 A. R. 670.

Semble, the mere existence of confidence is not enough; influence must be proved and is not to be presumed as from the existence of confidence. *Wallis v. Andrews*, 16 Chy. 637, followed. See *McEwan v. Milne*, 5 O. R. 100.

See also *Burn v. Burn*, 8 O. R. 237.

## 3. Fraud or Misrepresentation as a Ground of Action or Defence.

Action on a promissory note for \$1,000 made by the defendant to one M. The note was given in payment of the first instalment of the purchase money of a share in a syndicate formed under an agreement which stated that "We the undersigned hereby covenant, promise, and agree with each other to form ourselves into a syndicate," to purchase a lot of 300 acres of land in Manitoba from M., for \$50,000, divided into fifteen shares of \$3,333.33 each, to be paid to the trustee of the syndicate; the expenses of purchasing, advertising, selling, &c., to be borne proportionately by each member according to his share, appointing M. trustee to form the syndicate, and on completion the members were to appoint M., or any other person trustee to carry out the objects of the syndicate. The syndicate was completed, and the defendant appointed trustee, and a conveyance of the land made to him. It appeared that M. by fraudulently representing to defendant that the price he M. paid for the land was \$50,000, whereas it was only \$31,000, that it was well worth \$50,000, was suitable for being laid out for town lots, and that it could be readily sold at largely remunerative prices, induced the defendant, who resided in Toronto, and had no knowledge or means of acquiring knowledge, but relied upon the truth of these statements, to enter into the agreement. The defendant in consequence asked to have the agreement rescinded and the note delivered up to be cancelled:—Held, that by reason of the misrepresentation the defendant would have been entitled to be released from the contract had he been solely concerned, but that the defendant was not in a position alone to put an end to the agreement, for that the so-called syndicate was in fact a partnership, and all the members thereof were not asking for its rescission; and the defendant's remedy must be by cross-action or counter-claim for deceit. *Morrison et al. v. Earls*, 5 O. R. 434—C. P. D.

Evidence not admissible to cut down to a mortgage an instrument absolute in form executed for the purpose of securing a debt to a grantee, but also to protect the property from the results of an anticipated action for breach of contract. See *Mundell v. Tinkis et al.*, 6 O. R. 625.

In an action on a promissory note, the defendant counter-claimed, setting up that the note was given in part payment of the purchase money of certain land in Manitoba, which the defendant alleged that he was induced to purchase by plaintiff's false representation as to its value and location. The jury found the amount due on the note was \$1,590, but that the defendant was induced to enter into the contract to purchase the land by the plaintiff's fraudulent misrepresentations; and they assessed his damages at the above amount; and judgment was entered in defendant's favour:—Held, on the evidence, as set out in the report, there would be no rescission of the contract, but defendant must rely on his claim for damages for deceit; that the evidence failed to disclose actual fraud, at all events the only evidence which could be submitted to the jury was as to location, but while this was too slight to allow the verdict to stand, the court did not feel justified in disposing of the case themselves, though perhaps they might do so under O. J. Act, Rule 321. They therefore directed a new trial on the counter-claim, but so that plaintiff's legitimate claim on the note should not be delayed in the meantime, judgment was directed to be entered in his favour thereon. *Garland v. Thompson*, 9 O. R. 376—C. P. D.

G. obtained a loan of \$3,700 through R., from the plaintiffs, upon the security of 220 acres of land, by falsely representing that R. had purchased the 220 acres from W. for \$7,500, and had paid \$4,000 cash, and wanted the loan to pay the balance with, and on the receipt of the loan paid W. the \$3,000, which was the total purchase money for the 220 acres; and another parcel of about 50 acres, and was the full value of both parcels. G. got the conveyance from W. of both parcels, and conveyed the 220 acres to R. to carry out the scheme, and retained the 50 acres himself. In an action by the plaintiffs it was:—Held, that on the conveyance of the 50 acres being executed to G., the land immediately became the property in equity of the plaintiffs. That the land was not subject to the claims of certain execution creditors of G., whose fi. fas. were in the sheriff's hands. But that a mortgage on the 50 acres, made by S., who had no title, could not be ordered to be removed by the mortgagee (although the mortgage money was paid,) as the mortgagee was no party to the action. *Hamilton Provident and Loan Society v. Gilbert*, 6 O. R. 434.—Ferguson.

Misrepresentations to purchaser as to the land being free from incumbrances. See *Cameron et al. v. Carter et al.*, 9 O. R. 426.

The plaintiff sued upon a foreign judgment, which he had obtained against the defendant upon a covenant by the defendant to indemnify him against a mortgage made by the plaintiff to one G., who had foreclosed the mortgage and afterwards obtained judgment against the plaintiff on the covenant:—Held, that the effect of G. suing on the covenant in the mortgage after foreclosure was to open the foreclosure, and an allegation that the plaintiff had improperly concealed the fact of the foreclosure from the foreign court was no defence to this action:—Held, also, that an allegation that G. had agreed to take the land in full satisfaction of his debt showed no defence, but a mere verbal agreement without consideration:—Held, also, that an allegation

that the plaintiff had sustained no damage by the judgment and execution against him, and that the writs of fi. fa. against him were retained in the sheriff's hands under a fraudulent agreement between G. and the plaintiff, in order to sustain the proceedings against the defendant, showed no fraud, and was no answer to the action. Per *Wilson, C. J.*—The defendant was not at liberty to set up in answer to this action matters which could have been pleaded in the original cause. *Paisley v. Broddy*, 11 P. R. 202.—Wilson—C. P. D.

In an action of foreclosure of a certain mortgage of lands, the defence set up that the mortgage was given to secure a balance of purchase money for the land due from the defendant: that the plaintiff at the time of the purchase falsely represented that no one was in possession of the land, and that she could deliver immediate possession, which which she agreed to do by a certain date, and the defendant was thereby induced to accept a conveyance (which was in the statutory short form), and give the mortgage: that as a matter of fact the land was at the time of such representations and for a long time after in possession of one L., and the plaintiff was unable to deliver up possession on the said date: that after the expiry of the said date the defendant threatened proceedings for breach of the plaintiff's agreement, and for the said misrepresentations, and the plaintiff in consideration that he would forbear the same, agreed with him that the times of payment under the mortgage should be postponed for a length of time equivalent to that during which he was kept out of possession, and would pay him any damages sustained by him, and that he did so forbear, and by virtue of the premises no payment was yet due under the mortgage: which matters of defence being duly proved:—Held, that though the collateral parol agreement to deliver possession by a fixed date could not be enforced, because it contradicted or added to the short form covenant for delivery of possession in the deed of conveyance, yet on account of the said misrepresentations and the subsequent agreement, the plaintiff's action must be dismissed, and the defendant, having counter-claimed for damages, was entitled to the same, and to a reference to fix the amount thereof. *Keays v. Enard et al.*, 10 O. R. 314.—Ferguson.

Fraud by mortgagee purchasing through another at mortgage sale. See *Faulds et al. v. Harper et al.*, 9 A. R. 537.

The plaintiff negotiated with the defendants Griffith for the purchase of the lands in question, and at different times obtained from them writings giving him the option to purchase for \$20,000. Defendants Griffith set up that these negotiations were had with plaintiff as their agent with the view of effecting through him a sale to the Independent Order of Odd Fellows at the same or a higher price for the defendants Griffith. After these options had been given to the plaintiff he, on the forenoon of the 17th February, 1882, agreed to sell to the Odd Fellows for \$25,000; and afterwards on the same day he went to the defendants Griffith and offered to purchase for \$19,500 in lieu of the \$20,000 previously named. He was asked by the Griffiths whether the sale to the Odd Fellows was off, to which he replied that it was, and in the same conversation informed the Griffiths that he could not sell the

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L. F. D. b property, mo sound mind During his wife, procure to sell under was sold for Two years af E. B. for \$5,000 paid purchase an action by to s+ aside th Held, on the sold at a gre sale, and that but that as M without notio count of the p D. *Dufresne v. Ferguson*.

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property for \$20,000, as a reason why he should get it for \$19,500, for if sold to another he, plaintiff, would be entitled to a commission of \$500; and the Griffiths thereupon agreed to sell to plaintiff for \$19,500. Subsequently on the same day plaintiff entered into a contract in writing to sell to the Odd Fellows for \$25,000:—Held, that without reference to the question of agency to sell, the evidence shewed that a sale to the Odd Fellows was in contemplation of both parties and was the foundation of the transaction, and, reversing the judgment of Proudfoot, J., that the misrepresentation by the plaintiff in regard to the sale to the Odd Fellows, was such as disentitled him to a decree for specific performance. (Burton, J. A., dissentiente.) *Walmsley v. Griffith et al.*, 10 A. R. 327.

L. F. D. being the owner of certain valuable property, mortgaged it for \$700, became of unsound mind and was confined in an asylum. During his confinement M. A. D., his second wife, procured S., the holder of the mortgage, to sell under the power of sale, and the property was sold for \$900 to E. R., sister of M. A. D. Two years after E. R. sold the property to M. E. B. for \$5,000, and a mortgage for \$4,000 unpaid purchase money was taken to M. A. D. In an action by L. F. D., by L. D. his next friend, to set aside the sale or for an account, it was:—Held, on the evidence, that the property was sold at a great undervalue under the power of sale, and that E. R. was the agent of M. A. D., but that as M. E. B. was a purchaser for value without notice, the sale must stand, but an account of the proceeds was ordered against M. A. D. *Dufresne v. Dufresne et al.*, 10 O. R. 773.—Ferguson.

The plaintiff, upon the assurance of the defendant that a land warrant issued to one of the North-West Mounted Police Force would entitle the holder to 160 acres of Dominion lands, and which warrant on its face expressly stated that the party was entitled to 160 acres, purchased such warrant from the defendant for \$312. In consequence of various Acts of the legislature and orders in council, lands in the North-West territory, which at the time this warrant was issued were held for sale at \$1, were increased to \$2 per acre, so that on the presentation of the warrant to the proper officer, the plaintiff would only be credited with \$160 on the purchase of land at the established price. The defendant was not aware of this change. In an action brought by the plaintiff, the Queen's Bench Division:—Held, that he was not entitled to recover back his purchase money as having been obtained by misrepresentation. On appeal, this court being equally divided, the appeal was dismissed. *McKenzie v. Dwight*, 11 A. R. 381.

The defendant, in January, 1882, bought land in Manitoba from the plaintiff for speculative purposes, paying \$500 in cash, and giving a mortgage for the balance of the purchase money. Before the conveyances were executed the defendant, in answer to inquiries made by him to persons on the spot, received unfavourable accounts of the property, which were, however, explained away by the agent of the plaintiff. The defendant resisted payment of the mortgage, on which this action was brought, and counter claimed for a return of the \$500, upon the ground of false representations by the plaintiff's agent. On the

27th July, 1882, the defendant visited the land and found it worthless, and in the end of August or the beginning of September, gave notice of his intention to repudiate the contract. Armour, J., who tried the action, without a jury, found that the defendant was induced to purchase by false representations, but that he had by his delay elected to affirm the contract. The Queen's Bench Divisional Court affirmed the first finding, 2 O. R. 555, but set aside the second and gave judgment in the defendant's favour, Armour, J., concurring in that judgment:—Held, that the question of false representations was peculiarly one for the judge at the trial, and that his finding should not be disturbed, especially as it was concurred in by the Divisional Court:—Held, also, (Burton J. A., dissenting,) that the defendant had not by lapse of time, acquiescence, or delay, lost his right to rescind. Per Burton, J. A., there was evidence to justify the finding of Armour, J., that the defendant had made his election, and no sufficient grounds were shown for disturbing it; but as Armour, J., concurred in the judgment of the Divisional Court, and as the merits of the case did not call for interference, the judgment of the Divisional Court should be affirmed. *Lee v. MacMahon*, 11 A. R. 555.

See also *Peterkin v. McFarlane*, 9 A. R. 429; *Sweet et al. v. Platt et al.*, 12 O. R. 229.

## II. OTHER CONTRACTS.

### 1. Generally.

A contract induced by fraud is not void but voidable merely at the option of the party affected or prejudiced thereby; and when the party affected adopts the contract induced by the fraud, the discovery of a new incident of the fraud does not revive the right to repudiate. In this case there being no finding by the jury that the defendant had knowledge of, and had waived the fraud, a new trial was directed. *Walton v. Simpson*, 6 O. R. 213—C. P. D.

The defendant, at the instance of F., the plaintiff's manager, endorsed the note of C., to secure an advance to the latter on grain. It was represented to defendant by F. that the giving of his name was a mere formal matter: that only 75 per cent. of the value of the grain would be advanced: that warehouse receipts would be taken, and that he (F.) would from time to time see that the grain was in store, and would hold it in security for the money advanced, crediting the proceeds of any sales upon the note in question. The defendant was subsequently induced, by the representation of F., as the jury found, that it would not alter his position, to sign a guaranty under seal, which, though not intended, as F. stated, to vary the defendants' original liability, as a matter of fact did so, by permitting the plaintiffs to release or abandon their security upon the grain, upon the faith of which defendant became liable as endorser:—Held, that the guaranty was void as against the defendant; and that it was not necessary to prove that the bank manager knew, when he made it, that his representation was false; nor was it an answer that the defendant could have examined the deed for himself, as he was entitled to rely upon the representation of the bank's agent. *Molsons Bank v. Turley*, 8 O. R. 293—Q. B. D.

Amongst other defences, in an action on a covenant to pay contained in a chattel mortgage, the defendant set up that the mortgage in question was given for the purpose of defeating and delaying creditors of the mortgagor, and that the plaintiff (the mortgagee) was aware of that at the time, and aided and abetted the defendant, and that by reason thereof the mortgage was void and the covenant could not be enforced against defendant:—Held, that even if the defence was proved, the defendant, being a party to the fraud, should not be allowed to set it up as an answer to his liability on the covenant. *Millican et al. v. Healdon*, 8 O. R. 503—Q. B. D.

See *Beausoleil v. Normand*, 9 S. C. R. 711, p. 38; *Star Kibney Pad Company et al. v. Greenwood*, 5 O. R. 28, p. 50; *Moffatt v. The Merchants Bank of Canada*, 11 S. C. R. 46, p. 97.

## 2. Action for Deceit or False Representation.

### (a) Evidence.

In this action the plaintiff, in her statement of claim, charged her brother the defendant D. M. McD., with inducing her father to make a will in her mother's favour, with the fraudulent design on the part of D. M. McD. of obtaining the whole estate for himself, and charged that her father was induced to make the will by fraudulent misrepresentations, and that after her father's death, D. M. McD. obtained from her mother a power of attorney to manage the estate, and invested large sums in the purchase of property in his own name and that of his wife, and prayed to have the will set aside. D. M. McD., in his examination for discovery before the trial, admitted receiving the power of attorney from his mother after his father's death, and dealing with the estate under it, but denied having used any portion of the estate for his own purposes:—Held, that although what took place after the father's death was no proof of the fraudulent design, it might throw light upon it; and although the plaintiff was entitled to know generally what dealings the defendant D. M. McD. had with the estate, and to interrogate D. M. McD. upon his examination before the trial, as to whether he had invested all the moneys of the estate in his own or his wife's name, yet a general inquiry as to his dealings with each part and parcel of the estate, or as to what property came into his hands under the power of attorney, should not be permitted. *MacGregor v. McDonald et al.*, 11 P. R. 386—C. P. D.

### (b) Other Cases.

Action to recover from defendant a sum of money paid him in settlement of a loss by fire on a stock of goods, by reason, as was urged, of a misrepresentation as to the value of such stock at a date prior to the fire. The statement of claim alleged that defendant had falsely and fraudulently represented his net loss to be the amount so paid, whereby the plaintiffs were induced to pay the same; and that defendant falsely and fraudulently represented that at the date prior to the fire his stock on hand was of a certain value, whereas it was of a much less value; and that it was on the basis of such value that the calculation was made as to the amount of such net loss; also setting up the statutory conditions

whereby, as alleged, the claim was vitiated for fraud and false swearing as to the amount of the loss:—Held, on the issue as raised, the plaintiffs must fail, for the issue was as to the amount of the net loss which the evidence shewed had been misrepresented; and also that there would be no recovery on the record as framed, for—plaintiffs having accepted a surrender of the policy—they had not offered to, and possibly could not, place defendant in his original position; that no amendment would avail, for to maintain an action of deceit not only must there be misrepresentation, but it must be to the damage of the plaintiffs, which the evidence failed to shew; that the statutory conditions could hardly be invoked, for no proofs of loss had been required; but, even if invoked, they would afford no defence, as there was no misrepresentation as to the amount of loss:—Held, also, that the misrepresentation, even as urged, was immaterial, for it being as to the value of the stock at the named date, the fact of its causing an erroneous calculation upon which the amount of the loss was based, would make no difference so long as it was shewn that the loss itself was within the true amount; and also the plaintiffs were estopped from setting it up, as the evidence shewed that they did not rely upon it, but on the knowledge acquired and independent information obtained by the plaintiffs' agent in the course of his investigation:—Semble, that on the evidence there was no misrepresentation at all. *The Royal Insurance Company v. Byers*, 9 O. R. 120—C. P. D.

To sustain an action for deceit actual fraud must be proved, which is to be judged of by the nature and character of the representations made, considered with reference to the object for which they were made, the knowledge or means of knowledge of the person making them, and the intention which the law fully imputes to produce those consequences which are the natural result of his acts; and it must also be established that such fraud was the inducing cause to the contract, and must have produced in the mind of the person alleged to be defrauded an erroneous belief influencing his conduct. *Garland v. Thompson*, 9 O. R. 376—C. P. D.

The defendant delivered a piano to the plaintiff on a "hire contract," the price being stated to be \$500, payable by crediting \$100 on an old piano taken in exchange, and the balance of \$400 by monthly instalments, the plaintiff giving a note for the \$400, payable by like instalments. The contract stated that the defendant did "neither part with said piano," nor did the plaintiff "acquire any title" to it until the note was fully paid. Certain instalments fell due and payment was enforced, and there were instalments in arrear when action was brought. The plaintiff sued for fraudulent misrepresentations, and for general damages for breach of implied warranties; the alleged misrepresentations or warranties being that the piano was worth \$500; that it was a first class instrument, and as good as any Steinway or Chickering piano. The jury found for the plaintiff, with damages:—Held, that the plaintiff could not succeed as to the false representation, for the evidence shewed that after she discovered the piano was not as represented, she did not disaffirm the contract, or offer to return the piano, but treated the contract as subsisting; nor could she recover in an action for deceit, for she failed to shew that the defendant did not believe the

statements made recklessly, and as are proper. Held, also, that an action for lie. *Frye v.*

See *Beatty*, p. 106; *Moffatt*, 11 S. C. R. 46.

Fraudulent avoid liability *Canada Fire*, 284.

An executor the fraud or son he represents taint which such creditors during *v. Monteith*, Ordinary.

Impeaching ground of fraud on the A. R. 92.

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Following *Jack v. Jack*, 11 P. R. 386.

Of two innocent suffer on account a third, the one wrong to be charged *The Merchants*, 11 O. R. 498.

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A. who had of Dr. B., put B. had at the of land; and if dents, Dr. B., vent, should a caused to be p notary of his who, a few days had been indu exercise this who prepared of B. et al. refused did not like to believed that in heirs of Dr. F. B. et al. knew cepted the suc responsible for

statements made to be true, or that they were made recklessly; and also no damages were shewn; and—Semble, the statements were such as are properly styled simple commendation:—Held, also, that as the property had not passed, an action for the breach of warranty would not lie. *Frye v. Milligan*, 10 O. R. 509—C. P. D.

See *Beatty et al. v. Neelon et al.*, 12 A. R. 50; p. 106; *Moffatt v. Merchants Bank of Canada*, 11 S. C. R. 46, p. 97.

### III. MISCELLANEOUS CASES.

Fraudulent transfer of shares by directors to avoid liability for calls. See *Thompson et al. v. Canada Fire and Insurance Co. et al.*, 9 O. R. 244.

An executor or administrator is estopped by the fraud or criminal acts of the deceased person he represents from seeking to invalidate securities tainted by such fraud or criminal acts which such deceased person had given to his creditors during his lifetime. *Merchants Bank v. Monteith*, 10 P. R. 467.—Hodgins, *Master in Ordinary*.

Impeaching judgment in a partition case on the ground of fraud or deception having been practised on the court. See *Jenking v. Jenking*, 11 A. R. 92.

Impeaching decision of a Court of Revision on the ground of improper arrangement or conspiracy entered into before the holding of the court by the members thereof in conjunction with others to increase the assessment of plaintiffs. See *Canadian Land and Emigration Co. v. The Municipality of Dysart et al.*, 12 A. R. 80.

Following money fraudulently obtained. See *Jack v. Jack*, 12 A. R. 476.

Of two innocent parties, one of whom must suffer on account of the fraud or crime of a third, the one most to blame by enabling the wrong to be committed should bear the loss. See *The Merchants Bank of Canada v. McKay et al.*, 11 O. R. 498.

Effect of fraudulent judicial sale. See *Mitchell v. The City of London Fire Ins. Co. (Limited)*, 12 O. R. 706.

Costs of official guardian where there has been fraud by the infant. See *Westgate v. Westgate*, 11 P. R. 62.

A. who had a claim against the insolvent estate of Dr. B., purchased a right of redemption Dr. B. had at the time of his death in a certain piece of land; and in order that B. et al. (the respondents, Dr. B.'s children) who were perfectly solvent, should accept the succession of Dr. B., A. caused to be prepared a deed of assignment by a notary of his right of redemption to B. et al., who, a few days after the death of their father, had been induced for a sum of \$50 to consent to exercise this right of redemption. The notary who prepared the deed without the knowledge of B. et al. returned it to A., telling him that he did not like to receive the deed because he believed that in signing it B. et al. made themselves heirs of Dr. B., and besides he believed that if B. et al. knew that in signing the deed they accepted the succession of their father, and were responsible for his debts, they would not sign.

Another notary residing at a distance was sent for by A., to whom he gave the deed as prepared, and the notary then went to the residence of B. et al., read the deed to the parties, and without any explanation whatever passed and executed the deed of cession whereby B. et al. became responsible for the debts of their father. On being informed of the legal effect of their signature, B. et al. formally renounced to the succession of their father. There was also evidence that B. et al. had done some conservatory acts and acts of administration for their mother, but it was not proved that in any of these transactions they had taken the quality of heirs. The amount in dispute was made up by including interest which on the face of the declaration was prescribed. The respondents did not demur to this part of the demand, nor was any separate judgment rendered as to it:—Held, (1) that the case was appealable; (2) that the acceptance of an insolvent succession is null and of no effect when it is the result of deceit and corrupt practices, artifices and fraud; (3) that as A. in this case obtained the signatures of B. et al. to the deed in question by fraud, the latter should not be burthened with the debts of their insolvent father. *Ayotte v. Boucher*, 9 S. C. R. 460.

### FRAUDS, STATUTE OF.

- I. RESPECTING AGREEMENTS—See CONTRACT
- II. PAROL EVIDENCE TO VARY WRITTEN CONTRACTS—See EVIDENCE.

### FRAUDULENT CONVEYANCES.

#### I. AS AGAINST CREDITORS.

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#### I. AS AGAINST CREDITORS.

1. *Under 13 Eliz. c. 5; R. S. O. c. 118 and 48 Vict. c. 26.*
  - (a) *Generally*.

Where it was sought to set aside an assignment of real and personal property made by an insolvent debtor to a trustee for creditors, on the ground that the assignee had, before the execution of it satisfied some of his creditors in full by transferring goods of his to them in a manner alleged to be preferential, but the instrument impeached did not require the creditors to submit to any conditions, and did not provide for a



release of the debtor in any manner:—Held, that the instrument was valid, and could not be set aside, and the case was distinguishable from those American cases which embody the principle that a debtor shall not be allowed to dispose preferentially of part of his estate, and as part of the same scheme to turn over the remainder of it to trustees for creditors by an instrument which provides for his discharge:—Sembles, that where in such an instrument the goods are transferred subject to the payment of rent to a prior mortgagee this does not invalidate the instrument. Where such an instrument provides for the carrying on of the business of the insolvent debtor by the assignee, but only as subsidiary to the winding up of the same, this is not unreasonable, and does not invalidate the assignment. *Ontario Bank v. Lamont et al.*, 6 O. R. 147.—Boyd.

L. being in insolvent circumstances went to A., and asked A. to procure discounts for him, which A. agreed to do on condition that he should retain a part of the proceeds of the paper which should be brought to him, and apply it to the indebtedness of L. to him, and to several other creditors whom he, A., represented. This was agreed to and acted on, and certain securities were thus transferred to A. by L., L., also at the same time, requested A. to sell some leather for him, which A. agreed to do on similar terms as to the application of the proceeds, and the leather was duly transferred to A. who was aware of L.'s circumstances. On action being brought impeaching the transfer of the securities as a fraudulent preference:—Held, that inasmuch as the idea of the transfer as made was proposed by A., and he and not L., was the originator of the scheme, whereby he, and the creditors represented by him were preferred, the transfers were not made "voluntarily," and "with intent" to give such creditors a preference over the other creditors within the meaning of the statute, and could not be set aside. *Whitney v. Toby et al.*, 6 O. R. 54.—Ferguson.

The H. company being indebted to the plaintiffs in about \$4,750, application was made by letter and verbally by the latter, insisting upon payment or security. The company, which to the knowledge of the plaintiffs, was hopelessly insolvent, thereupon gave a chattel mortgage to the plaintiffs, covering all their available assets. The mortgage recited that the plaintiffs had agreed to loan the company \$5,000 on the said security, but the arrangement was that the plaintiffs should deduct the amount of the debt due them out of the pretended loan:—Held, that the above was a fraudulent preference, and there was no such bona fide pressure as exempted the case from the provisions of R. S. O. c. 118. *Long et al. v. Hancock et al.*, 7 O. R. 154.—Boyd.

Pressure will not validate a security unless it be a bona fide pressure to secure a debt, and without a view of obtaining a preference over the other creditors. *Powell v. Cudler et al.*, 8 O. R. 505.—Proudfoot.

The jury having found that T. was, to his own knowledge and that of the preferred creditors, unable to pay his debts in full, and that assignments to certain creditors of two policies of insurances and moneys secured thereby, after the larger portion of the property insured had been destroyed by fire, had been made under simulated

pressure with the intent on the part of T. to give, and on the part of the preferred creditors to obtain a preference over the other creditors of T.:—Held, that the assignments were null and void under R. S. O. c. 118, s. 2, as against the other creditors of T. *Ivey & Co. v. Knox et al.*, 8 O. R. 635.—Q. B. D.

In a deed of assignment for the benefit of creditors, the following clause was inserted: "And it is hereby declared and agreed that the party of the third part, the assignee, shall, as soon as conveniently may be, collect and get in all outstanding credits, &c., and sell the said real and personal property hereby assigned, by auction or private contract, as a whole or in portions, for cash or on credit, and generally on such terms and in such manner as he shall deem best or suitable, having regard to the object of these presents." No fraudulent intention of defeating or delaying creditors was shown:—Held, affirming the judgment of the court below, 8 A. R. 402:—that the fact of the deed authorizing a sale upon credit did not, per se, invalidate it, and the deed could not on that account be impeached as a fraudulent preference of creditors within the Act R. S. O. c. 118, s. 2. *Slater v. Badenach*, 10 S. C. R. 296.

The plaintiffs sought to set aside a certain conveyance dated February 27th, 1880, and made by M. to G., as executed in fraud of themselves as creditors. It appeared that the plaintiffs had not recovered judgment for the debt in respect of which they claimed to be creditors until July 23rd, 1883, and that this was a judgment recovered in an action on a covenant as to the validity of certain mortgages purchased by them from M. contained in a deed of March 1st, 1880, by which the said mortgages were conveyed by M. to them. The plaintiffs, however, sought at the trial of this action to give evidence that this deed of March 1st, 1880, was made in pursuance of an agreement for the purchase of the said mortgages entered into by themselves with M. before January 1st, 1880, and that this agreement was induced by certain misrepresentations made by M. as to the validity of the said mortgages. It appeared, however, that the consideration of the purchase was to be the transfer of certain shares in the capital stock of the plaintiffs' company to M., and that these shares were not actually so transferred until after 27th February, 1880, and the evidence so sought to be given was excluded:—Held, (per Ferguson, J.,) that the liability of M. only began at the time of the execution of the covenant in the deed of March 1st, 1880, and inasmuch as the impeached conveyance was antecedent to this, and it was not shewn that there were at the date of it any existing debts, nor that it was intended to defeat any future debt, the plaintiffs must be nonsuited:—Held, on appeal, (per Boyd, C.,) that since the plaintiffs did not really become creditors of M. until they recovered judgment, the legal and only position of the plaintiffs was that of subsequent creditors, and as it was not pretended that the impeached conveyance was given with a view to defeat subsequent creditors, the plaintiffs had no locus standi to recover under 13 Eliz. c. 5, even if the impeached conveyance was held to be of a voluntary character, as to which quære. It was alleged: her illusory to endeavour to trace back the origin of the plaintiffs' claim to the alleged misrepresentations which were not acted upon until

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after the impeached conveyance, and moreover, whatever cause of action the plaintiffs then had, they did not prosecute it, or become creditors in respect of it. The judgment below was therefore right. Per Proudfoot, J., though an action for damages could not be brought until the damage occurred, yet if the original agreement for the purchase of the mortgages was based on misrepresentations of M., the plaintiffs' right dated from the agreement. It was not necessary for the plaintiffs to be creditors, it was sufficient for them to have a right of action; therefore the exclusion of the evidence offered by the plaintiffs as aforesaid, and the judgment of the court below was wrong:—Held, also, (per Proudfoot, J.,) that on the evidence adduced, the conveyance impeached appeared to have been a voluntary one. *The Real Estate Loan Company of Canada (Limited) v. The Yorkville and Vaughan Road Company et al.*, 9 O. R. 404.—Chy. D.

A trader, who was in embarrassed circumstances, made an assignment for the benefit of creditors of all his estate, real and personal, to the plaintiff, who held a mortgage on a part of the realty as security against his indorsement for the assignor of notes then current. No creditor joined in the conveyance, nor was the consent or knowledge of it by any creditor shewn:—Held, affirming the judgment of the County Court, that the property was liable to seizure under execution, for under the mortgage the trustee was not a creditor; but—Semble, (per Patterson, J. A.,) that had the trustee been beneficially interested in the proceeds of the property, his assent would have rendered the deed irrevocable. *Cooper v. Dixon*, 10 A. R. 50.

The weight of authority greatly preponderates in favour of the view that in order to work a fraudulent preference of a creditor, under R. S. O. c. 118, there must be a concurrence of intent so to do on the part of both debtor and creditor; and the rule of the court is not to act upon mere suspicion in the absence of affirmative evidence of fraud, or of controlling circumstantial evidence leading to that conclusion. *Lancey v. The Merchants' Bank*, 10 O. R. 169 n, followed in preference to *Ivey v. Knox*, 8 O. R. 635. *Burns et al. v. Mackay et al.*, 10 O. R. 167.—Boyd.

A deed of assignment for the benefit of creditors gave power "until the said trustee shall deem it advisable to dispose of the said business, to carry on the same, employing any person or persons as his agent or agents for such purpose if he deemed it best, paying him or them such reasonable allowance therefor as may be agreed upon, and to supply the said agent or agents with such goods or merchandise as may be requisite for such purpose," and the trustee was not to become liable for the debts or losses of the said business in any way except for the distribution of the moneys come to his hands under the deed. There was no evidence of any intentional dishonesty on the part of the assignor:—Held, reversing the judgment of the County Court, that this provision did not invalidate the deed under R. S. O. c. 118. (Hagarty, C. J. O., dissenting.) *Alexander v. Warell*, 10 A. R. 135.

For the expressed purpose of making a fair and equitable distribution of his property and effects amongst all his creditors, a trader in insolvent circumstances executed a deed of assignment of all his property, real and personal, in trust to

sell the same, and out of the proceeds: (1) to pay in full the several debts due or to become due by the assignor to the assignee, and the several other persons and firms designated in a schedule annexed thereto, and if insufficient for that purpose, to distribute the proceeds ratably amongst the several persons and firms named in the said schedule; and (2) to return any surplus to the assignor. A claim for \$26.86, which the court below held to be established, was in ignorance or by inadvertence omitted from such schedule, and the defendant, a scheduled creditor, obtained judgment for \$1,780.75; and under his execution the sheriff seized the goods. The Common Pleas Division held the deed to be invalid in consequence of the omission of such claim for \$26.86. On appeal, this court being equally divided, the appeal was dismissed, with costs. Hagarty, C. J. O., and Burton, J. A., affirming the judgment of the Common Pleas Division, 32 C. P. 524. Patterson, J. A., and Cameron, C. J., held, that the alleged debt of \$26.86, upon the evidence set out in the report, was not proved; and that even if proved, its omission from the schedule did not, under the circumstances, shew the intent necessary to invalidate the deed under R. S. O. c. 118, s. 2. Per Hagarty, C. J. O., there having been apparently no discussion at the trial, or in the Divisional Court, as to the sufficiency of the evidence on which the alleged debt was held to be proved, the existence of such debt should not be treated as open to question in this court. Per Hagarty, C. J. O., and Burton, J. A., dissenting from the opinion of Wilson, C. J., in *Thorne v. Torrance*, 18 C. P. at p. 35, the creditor omitted could not now be admitted to the schedule. Contra, per Patterson, J. A., and Cameron, C. J. Remarks per Cameron, C. J., as to the circumstances under which a provision for the payment of rent and taxes as a first charge would or would not be an objection. Remarks per Burton, J. A., and Cameron, C. J., as to the object and effect of the proviso to R. S. O. c. 118, s. 2. Quere, (per Cameron, C. J.,) whether the omitted creditor not having obtained judgment and execution, the defendant could take advantage of such claim to defeat the plaintiff's right. *McLean v. Garland*, 10 A. R. 495. But see Cassels' Digest p. 178.

On the 28th March, 1882, a writ was issued by C. et al., respondents, against one M., for the recovery of the sum of \$32,155.33, and said writ was duly indorsed, in accordance with the provisions of the Judicature Act, with particulars of the claim of the respondents for the said sum of \$32,155.33 on an account previously stated and settled between C. et al. and M., such amount being arrived at by allowing to M. a discount of 5 per cent. for the unexpired balance of the term of credit to which M. was entitled on the purchase of the goods. No appearance was entered by M. to the writ, and on the 8th April judgment was recovered for the amount, and on the same day writs of execution were issued. M. et al., appellants, creditors of M., instituted an action against him on the 8th April, 1882, and obtained judgment on the 14th April, and on the same day writs of execution were issued. The stock-in-trade was sold by the sheriff at public auction, under all the executions in his hands, to the respondents, who were the highest bidders. On a trial in an interpleader issue, to try whether appellants' execution against M. was entitled to priority over that of respondents, and whether

the judgment of the latter was void for fraud, and as being a preference; and whether respondents' executions were void as against appellants' execution, on account of their having issued them before the expiration of eight days from the last day for appearance, Mr. Justice Armour directed a verdict or judgment to be entered in favour of the appellants. That judgment was reversed by the Queen's Bench Division of the High Court of Justice of Ontario (2 O. R. 243), whose judgment was affirmed by the Court of Appeal for Ontario. On appeal to the Supreme Court of Canada:—Held, affirming the judgment of the Court of Appeal, 10 A. R. 92, that what the debtor did in this case did not constitute a fraudulent preference prohibited by R. S. O. c. 118, and that the premature issue of the execution of the respondents was only an irregularity, and not a nullity. *MacDonald v. Crombie*, 11 S. C. R. 107.

In an action by a creditor for an account due on a mortgage, and to set aside a conveyance of personal property in which the judge who tried the case found that the transaction complained of was not made with intent to defeat the claims of creditors, or to give a preference, and that no collusion or fraud was proved. It was Held, that as none of the creditors were judgment and execution creditors, in the absence of fraud, the plaintiffs could not set aside the transaction under the statute of Elizabeth, and that although under 48 Vict. c. 26, s. 2, (Ont.) it might possibly be that the transaction should be held to be void as against creditors as having the effect of defeating, delaying, or prejudicing creditors, yet as the sale was not a sham, or a colourable one, but was a real transaction and bona fide, that the plaintiffs failed on that branch of the case. Part of the purchase money of the goods was arranged by the substitution of a note of the defendants for the notes of the defendant J. P., which had been transferred to a banker, and which note was on the subsequent sale to the defendant F. paid by him:—Held, that the transaction was a bona fide payment under 48 Vict. c. 26, s. 3, (Ont.) *The Building and Loan Association v. Palmer et al.*, 12 O. R. 1.—Ferguson.

McP. Bros., a firm composed of two partners, by deed assigned to the plaintiff the partnership property and assets only, upon trust to pay the joint creditors only. The deed authorized the plaintiff to pay creditors' claims either with or without interest. On the day before the assignment the sheriff had seized the partnership property under two writs of execution (one of which he swore at the trial he thought was against one of the partners only, but there was no further proof of this), and put the plaintiff in possession as his bailiff. McP. Bros. then determined to assign to the plaintiff, and it was arranged between the sheriff and the plaintiff that on the execution of the assignment the plaintiff should retain possession subject only to these executions:—Held, that the deed was not void under R. S. O. c. 118, for intent to prefer particular creditors; nor for intent to prefer particular creditors, even if such intent were shown, by the arrangement between the plaintiff and the sheriff, inasmuch as the assignors were not parties to such arrangement; nor by reason of the provision for payment of creditors' claims with or without interest. *Ewart v. Stuart et al.*, 12 A. R. 99.

In an action impeaching the transfer of certain notes by an insolvent trader to his wife, the hus-

band swore such transfer was made to secure her the payment of moneys loaned by her. Immediately after such transfer he absconded from the province. At the trial the jury found, in answer to questions put by the presiding judge, (1) that the husband at the time he absconded was not solvent and able to pay his debts in full; (2) that he knew himself at the time to be on the eve of insolvency; (3) that the transfer of the notes to his wife was not voluntary; (4) that the scheme of such transfer originated with him and not with his wife. The jury, however, failed to find with what intent the transfer was made, and gave a verdict in favour of the defendant (the wife), which, on motion in term, the judge refused to disturb. On appeal this court, being of opinion that the answers given by the jury did not afford sufficient ground for a decision under R. S. O. c. 118 ordered a new trial, but under the circumstances directed each party to bear their own costs, both of the appeal and of the new trial. *Fraudenburgh v. Haskins*, 12 A. R. 257.

See *Martin v. Evans*, 6 O. R. 238, p. 33.

#### (b) Bills of Sale and Chattel Mortgages.

In order to create a fraudulent preference under the statute of Elizabeth as interpreted by R. S. O. c. 95, s. 15, not only must there exist a fraudulent intent in the mind of the mortgagor, but also in that of the mortgagee. In this case, which was that of a mortgage of goods:—Held, that no such intent was shown on the part of the mortgagee; nor, Semble, on the part of the mortgagor. *Hepburn v. Park et al.*, 6 O. R. 472.—C. P. D.

Where it was sought to set aside a bill of sale of personal property as fraudulent and void, as against the creditors of the grantor, and the evidence showed that it was reluctantly given by the debtor, who only yielded after some delay, and to a continuous insistence on the part of his creditors, his intent being to escape his creditor's importunity, and that the demand of the creditor was made bona fide, with no intent but to obtain the security, which she was advised she ought to have:—Held, affirming the decision of Proudfoot, J., that the bill of sale was not void under R. S. O. c. 118, sec. 2. Under that section the intent with which the conveyance, or gift in question was made, must be looked at, and if it was obtained as the result of honest pressure on the part of the creditor, that rebuts the presumption of an intent on the debtor's part to act in fraud of the law. *Slater v. Oliver et al.*, 7 O. R. 158.—Chy. D.

In March, 1879, the defendant E., a milliner, removed her business to the village of Tara, and in the November following changed her then residence and place of business to a shop owned by her co-defendant, adjoining to and under the same roof as his own. In the spring of 1880 the defendants commenced other business transactions, when her co-defendant lent E. \$120 to enable her to purchase stock for her business, she promising to give him security for its repayment by executing in his favour a mortgage on everything she had. The parties continued their business relations, E. advancing E. moneys from time to time, till in November, 1880, she was indebted to him in the sum of \$463.73, including one year's rent of her shop, a bill of E.'s for medical attend-

ance, and a sum which she expended on her stock. Both defendants denied the security, so, until after T.'s solicitors' action was over, O., and Bureau Ferguson, J., transaction was same having heard the evidence there was sufficient to support the mortgage, were no sufficient interference by the learned judge. J.J. A., dissented, established that intent to prefer to of the mortgage sequence of payments, or in full, and even if sufficient been, nevertheless had the statute, as *Brayley v. Ellis*.

S. & W., a firm coming embarrassing man of J. to give security of H. two notes maturing at short payable to P., who was a brother with him in another mortgage was given had in their business was paid him by notes. A few days U. caused the under an execution subsequent to the interpleader act the chattel mortgage execution:—Held, that as if granted to P. only against fraudulent evidence seen against creditors, defendant W. did not honor by the assignment which was after C. R. 5.

H., a creditor, which he held to have a chattel declared void as that in the absence held by him was *Clark v. The City*, 9 O. R. 177.

C., a retail trader, wholesale merchant, to secure sum of about \$1000 by H. & Co. mortgage, which pay off in full all

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ance, and a sum for interest accrued due, and for which she executed a chattel mortgage, covering all her stock in trade and household effects. Both defendants swore that E. refused to execute the security, notwithstanding her promise to do so, until after the receipt by her of a letter from T.'s solicitors demanding payment, or in default an action would be brought. Per Spragge, C. J. O., and Burton, J. A., affirming the judgment of Ferguson, J., 1 O. R. 119, that although the transaction was open to grave doubts, yet the same having been sustained by the judge who heard the evidence, and who considered that there was sufficient pressure proved to show that the mortgage was not given voluntarily, there were no sufficient grounds shown to justify an interference by this court with the decision of the learned judge. Per Patterson and Morrison, JJ. A., dissenting.—The evidence sufficiently established that the mortgage was given with intent to prefer the mortgagee to the other creditors of the mortgagor: that it was not given in consequence of pressure on the part of the mortgagee, or in fulfilment of a promise to give it; and even if such pressure or promise had satisfactorily been shown, the intent to prefer would nevertheless have existed within the meaning of the statute, and have defeated the mortgage. *Brayley v. Ellis et al.*, 9 A. R. 565.

S. & W., a firm, of whom W. was a minor, becoming embarrassed arranged with H., the managing man of J. G. & Co., their principal creditor, to give security for their debt. At the instigation of H. two notes for the amount of this indebtedness maturing at short dates were made by S. & W., payable to P., and endorsed to J. G. & Co. by P., who was a brother-in-law of J. G., and connected with him in another business, and a chattel mortgage was given by S. & W. on everything they had in their business to P. to secure him, and \$50 was paid him by J. G. & Co., for endorsing the notes. A few days after the mortgage was given C. caused the sheriff to seize S. & W.'s goods under an execution in his hands, received subsequent to the making of the mortgage. In an interpleader action between P., claiming under the chattel mortgage, and C. claiming under his execution:—Held, that the mortgage must be treated as if given to J. G. & Co., for it was made to P. only as a device to avoid the statute against fraudulent preferences, and that upon the evidence set out, it must be held void as against creditors:—Semble, that the share of the infant W. did not pass by the chattel mortgage, nor by the assignment for the benefit of creditors which was afterwards made. *Powell v. Calder et al.*, 8 O. R. 565.—Pondfoot.

H., a creditor of S., in respect of a debt for which he held security on the lands of S., sought to have a chattel mortgage made by the latter declared void as a fraudulent preference:—Held, that in the absence of proof that the security held by him was inadequate he could not succeed. *Clark v. The Hamilton Provident and Loan Society*, 9 O. R. 177—City. D.

C., a retail trader, being indebted to H. & Co., wholesale merchants, gave them a chattel mortgage to secure such indebtedness, and also a further sum of about the same amount, advanced to him by H. & Co. at the time of the giving of the mortgage, which C. represented was sufficient to pay off in full all his other creditors. C.'s in-

debtedness to H. & Co., was covered by his promissory notes, which at the time of the execution of the mortgage were on discount with H. & Co.'s bankers. During the currency of the mortgage, C. having allowed his property to be seized for rent, H. & Co. took possession under their mortgage. C. being unable to pay his creditors, the plaintiffs, who were creditors, but had not recovered judgment or execution, took action to set aside the chattel mortgage:—Held, affirming the judgment of Armour, J., that under the evidence set out in the report there was no fraud. *Hyman v. Cuthbertson*, 10 O. R. 443—Q. B. D.

An insolvent debtor informed his creditors of his difficulties, and on the 19th March, 1885, all but two of the creditors signed a memorandum to the effect that the best thing he could do was to sell out his stock and effects for a sum named and agreed to be paid by one of the creditors, and which would pay all his creditors 50 cents in the dollar on certain terms, and those who signed agreed to accept 50 cents in full of their claims. The debtor afterwards accordingly, by bill of sale dated the 9th of April following, sold and conveyed his assets to one of the said creditors, who had signed the memorandum, for the sum and on the terms named therein, which were that the money was to be paid in four and eight months, and the purchaser was to endorse the vendor's notes, so that he could transfer them to the creditors. The bill of sale referred to the previous agreement, and recited that "the creditors" had agreed "to accept these notes "in full satisfaction and discharge of their respective claims" against the debtor, and also provided that the balance, if any, "after deducting the debt of the purchasers," (who were among those agreeing to accept the 50 cent composition,) should be paid to the debtor:—Held, that this amounted in effect to a condition that any creditor receiving the 50 cents in the dollar of his claim, should release the debtor, and that the sale was therefore void as against the two non-assenting creditors under R. S. O. c. 118, s. 2. Per O'Connor, J., the reservation to the purchasers of "the amount of the debt" was ambiguous, and might mean their whole debt, in which case the sale was preferential, and so void. *Jennings et al. v. Hyman et al.*, 11 O. R. 65—Q. B. D.

A chattel mortgage given as security for a bona fide debt cannot be avoided under R. S. O. c. 118, by simply showing that the debtor was insolvent, and intended to give the mortgagee a preference, but there must be knowledge on the part of the creditor taking the mortgage so as to constitute a concurrence of intent on the part of the debtor and creditor; and not the amendment made by 47 Vict. c. 10, s. 3, (Ont.) does not affect the matter. *Burns v. McKay*, 10 O. R. 167, followed. In this case there was no knowledge on the part of the mortgagee of the debtor's insolvency; and it also appeared that the mortgage was given in pursuance of a previous promise to give security for the debt. The mortgage was therefore upheld:—Quere, whether, where the statute may be defeated by shewing an antecedent promise to give security, it must be such as the promise indicated. *McRoberts v. Strinoff*, 11 O. R. 369—Q. B. D.

A formal defect in a chattel mortgage may be cured by a conveyance at any time before an exe-

cution reaches the sheriff's hands; but such conveyance, whether effected by a deed or by delivery only, has no retroactive operation, and if void for intent to prefer under R. S. O. c. 118, would not suffice to cure the defects. The intent to prefer is a question of fact for the jury; and therefore where the jury found that there was such intent, and where there was evidence to support the finding, the judgment of the County Judge setting aside the jury's verdict in favour of the execution creditor was reversed, but a new trial was directed in order that evidence might be given to shew that the bill of sale was made in order to carry out honestly the original mortgage contract. (Osler, J. A., dissenting.) *Smith v. Fair*, 11 A. R. 755.

The plaintiffs having a claim against the Hamilton Knitting Company, pressed the company for payment of their demand or security therefor. All parties were conscious that the company was insolvent and could not carry on their business, but would have to make an assignment unless they obtained an extension of credit from the plaintiffs, on getting which their manager stated that "he could carry the concern along." On the suggestion of one of the plaintiffs, the company agreed to give a mortgage on their works, &c., but as it was the opinion of all that the company could not give a mortgage to secure a pre-existing debt, it was arranged that a simulated loan should be effected by the plaintiffs to the company, nearly the whole of which should be applied to the payment of the plaintiffs' claim: and such an arrangement was carried out accordingly. On a proceeding instituted to impeach this mortgage, Boyd, C.:—Held the transaction a fraudulent and preference under R. S. O. c. 118, (7 O. R. 154) an appeal from that judgment, owing to an equal division of the judges in this court, was dismissed with costs. *Long et al. v. Hancock*, 12 A. R. 137.

A company, incorporated in the state of Michigan, while in insolvent circumstances, had given a mortgage upon chattels in Ontario to defendant, a Michigan creditor, to secure previous cash advances made to the company under verbal promises by two directors that security would be given. The effect of the mortgage was to delay and prejudice other creditors and give defendant a preference over them:—Held, that under 48 Vict. c. 26, (Ont.) without regard at all to any question of bona fides, pressure, or knowledge of the company's financial position by its officers, or by defendant, the effect alone of the transaction avoided it:—Held, also, that this mortgage was not given in pursuance of any antecedent contract or promise of the company, but even if it were that it could not be upheld, because it was not shown to have been given in consideration of a money advance made in the bona fide belief that such advance would enable the debtors to continue business and pay their debts in full. *River Slave Company v. Sill*, 12 O. R. 557—4 O. B. D.

See *Macdonald et al. v. McCall et al.*, 12 A. R. 593, p. 294; *Barber v. Macpherson*, 13 A. R. 356, p. 59; *Furlong v. Reid*, 12 O. R. 607, p. 246.

### (c) Change of Possession.

In an interpleader issue it was alleged that the plaintiff (the claimant) had purchased a horse from S. B. S., a married woman carrying on

business in her own name, the price of which was said to have been paid partly in a note of hand of S. B. S. and her husband, for money lent to them, and partly by a set-off of wages coming to plaintiff from S. B. S. On the completion of the purchase the plaintiff took the horse, together with a cutter and harness belonging to S. B. S., and was absent for two or three days. On his return he put the horse in the stable of S. B. S. as before, and fed it with her fodder, &c.—no other act was shown to indicate a change of ownership before the animal was seized by the sheriff under a fi. fa. goods issued against S. B. S. Per Barton and Patterson, J.J. A., affirming the judgment of the County Court, that there was not such a continued change of possession as to satisfy the requirements of the statute, R. S. O. c. 118, and that the judge had rightly withdrawn the case from the jury. Per Hagarty, C. J. O., and Osler, J. A.—There being a jury the evidence was such as to require the case to be left to them. *Pettigrew v. Thomas*, 12 A. R. 577.

### 3. Other Preferential Assignments.

Where one impeached a conveyance of land to M., the wife of K., on the ground that the land was really bought with K.'s money, so bought and conveyed to M. at K.'s direction, with the intent of delaying and hindering the plaintiff and other creditors of K., and no fraudulent intent in respect to the said conveyance was proved, and it appeared that the plaintiff himself was consulted with regard to the matter and knowing all the circumstances of K.'s financial position, expressed his approval of what was done; and it further appeared that the plaintiff was not himself a creditor of K. at the time the impeached conveyance, but only became so subsequently by endorsing and finally paying a promissory note of K.'s representing a liability incurred by K. prior to the impeached conveyance:—Held, affirming the decision of Ferguson, J., that under these circumstances the plaintiff could not have the deed set aside as a fraud upon him. *Ferguson v. Ferguson et al.*, 9 O. R. 218—Chy. D.

In 1878 J. D., carrying on business as a warehouseman, arranged with his two sons, H. D. and T. D., to convey to H. D. two parcels of land which H. D. was to hold until T. D. came of age. H. C. held the land until 1882, when he conveyed it to his father, who immediately reconveyed the parcel to H. D. and the other to T. D. It was found that the conveyances of 1882 were made to carry out the trust upon which the conveyance of 1878 was made: that when it was made J. D. was in a position to pay all his debts in full, and after deducting the property in question; that no debt in existence when the conveyance of 1878 was made was now unpaid, except a debt of \$1,000 due to the wife for rent, which was secured by mortgage, but it appeared she joined in the conveyance, and therefore it was available to the plaintiffs for the purpose of setting the conveyance aside:—Held, that the conveyances to H. D. and T. D. were valid, that under the circumstances they could not be deemed to be made with intent to hinder, delay or defraud creditors. *The Bank of Montreal v. Davis et al.*, 9 O. R. 556—C. P. D.

A trader who was in insolvent circumstances and for whom the plaintiff D. was liable

deceased on not current, was security, which offered to sell household furniture, paying the goods, retired the secured, but court that E. the arrangement the judgment E. was aware of proof of mortgage as a *Brown et al.*—

One G., in certain lands. ment for a del brought this a declared volun was pleaded in relief asked the Statute of 1873, under feasible by cr was entitled to deed remains may not be e purchasers for consel, or beca ing been 10 years. *Boyer*

J. M., who with the conce brother, who insolvent's L., effected trade, book d at 60c. in the paid to S. & thereof on the Held, that this as a fraudulent s. *McNaughton*

A trader, w stances, made creditors of al the plaintiff, v the reality as se the assignor of pinned in the co or knowledge o affirming the ju the property wa tion, for under creditor; but that had the t in the proceed we render a phron, 10 A. R

See *The Builders' Association et al.*, 12 O. R. 593, p. 294; *McCall et al. v. Macpherson*, 13 A. R. 356, p. 59; *Furlong v. Reid*, 12 O. R. 607, p. 246.

II. By In an action of themselves

indorser on notes discounted at a bank and then current, was urged by him for a settlement and security, which, however, he refused to give, but offered to sell E. the whole of his stock in trade, household furniture, &c. E. accordingly bought it, paying the vendor \$1,400, the excess in value of the goods over and above the notes, which he retired the same day. Next day the vendor absconded, but the evidence failed to satisfy the court that E. intended to commit any fraud in the arrangement so carried out. Held, affirming the judgment of the court below, that although E. was aware that the debtor was in pecuniary embarrassments, the transaction, in the absence of proof of mala fides, was not liable to be impeached as a fraudulent preference. *Lewis v. Brown et al.*,—*Elliott v. Brown et al.*, 10 A. R. 639.

One G., in 1873, made a conveyance in fee of certain lands. The holder of an unsatisfied judgment for a debt incurred prior to the conveyance brought this action to have the said conveyance declared voluntary and void as against him. It was pleaded in defence that the right to have the relief asked had become extinguished, for that the Statute of Limitations had rendered the deed of 1873, under which possession was taken, indefeasible by creditors:—Held, that the plaintiff was entitled to the relief asked. A fraudulent deed remains so to the end of time, though it may not be effectively impeachable because of purchasers for value without notice having intervened, or because of the claims of all creditors having been barred or extinguished by lapse of years. *Boyer v. Gaffield*, 11 O. R. 571.—*Boyd*.

J. M., who was in insolvent circumstances, with the concurrence if not at the instance of his brother, who was liable as indorser on some of the insolvent's paper held by the defendants S. & M., effected a sale of all his (J. M.'s) stock-in-trade, book debts, &c., to a bona fide purchaser at 60c. in the dollar; the proceeds of the sale he paid to S. & M., and they credited a portion thereof on the notes endorsed by the brother:—Held, that this was not liable to be impeached as a fraudulent preference of S. & M. *Harvey v. McNaughton*, 10 A. R. 616.

A trader, who was in embarrassed circumstances, made an assignment for the benefit of creditors of all his estate, real and personal, to the plaintiff, who held a mortgage on a part of the realty as security against his indorsement for the assignor of notes then current. No creditor joined in the conveyance, nor was the consent or knowledge of it by any creditor shown:—Held, affirming the judgment of the County Court, that the property was liable to seizure under execution, for under the mortgage the trustee was not a creditor; but—*Semble*, (per Patterson, J. A.) that had the trustee been beneficially interested in the proceeds of the property, his assent would have rendered the deed irrevocable. *Cooper v. Dixon*, 10 A. R. 50.

See *The Building and Loan Association v. Palmer et al.*, 12 O. R. 1, p. 287; *Macdonald et al. v. McGill et al.*, 12 A. R. 592, p. 294; *Beemer v. Miller*, 10 A. R. 656, p. 218.

## II. BY MARRIAGE SETTLEMENT.

In an action brought by T. K. & Co., on behalf of themselves and all other creditors of J. G.

against J. G., his wife, and the trustee, to set aside a marriage settlement by which J. G., a day or two before his marriage had settled the greater portion of his property on his wife in which it was shown that he and his wife before the marriage were living on the most intimate terms short of the intimacy of husband and wife, and that she would have accepted a proposal of marriage without hesitation without any condition as to a marriage settlement, and that he was in insolvent circumstances, of which fact she must have been aware, and that the settlement was purely voluntary on his part, and that she knew nothing of it until she was asked to sign the deed:—Held, that the settlement was not the consideration, or part of the consideration of the marriage, and that it must be set aside as fraudulent and void against creditors: *Commercial Bank v. Cooke*, 9 Chy. 524 and *Columbine v. Penhall*, 1 Sm. & G. 228 referred to and followed; *Fraser v. Thompson*, 1 Gif. 49, distinguished. *Thompson et al. v. Gore et al.*, 12 O. R. 651—Chy. D.

## III. PARTIES IN ACTIONS TO SET ASIDE.

C., who was in insolvent circumstances, made a chattel mortgage of his stock in trade to the defendants M. & Co., to secure a debt and afterwards executed a general assignment to the defendant F. for the benefit of his creditors. The plaintiffs, who were simple contract creditors of C., and whose debts were not due, brought this action on behalf of themselves and all other creditors of C. except the defendants M. & Co., to have the mortgage declared void under R. S. O. c. 118:—Held, affirming the judgment of Ferguson, J., 9 O. R. 185, that the mortgage was void under the said statute; that the plaintiffs could maintain the action, and that it was no objection that they did not include the mortgagees among the creditors, on whose behalf they professed to sue. *Longway v. Mitchell*, 17 Chy. 190, followed. *Macdonald et al. v. McGill et al.*, 12 A. R. 593.

Held, also, (Burton, J. A., dissenting) that the circumstance that C.'s equity of redemption in the goods had been assigned to F. did not deprive the plaintiffs of the right to maintain the action to avoid the mortgage. The goods having been sold by consent, pending the action, and the money paid into court, the judgment in the court below directed the payment out of the money to F., the assignee, for distribution by him under the trust of the assignment. The judgment in this particular, was varied on the ground that the goods had not passed to F. by the assignment, and the money was left to be dealt with by the court below on application of the parties claiming it. *Id.*

Per Burton, J. A.—C. having before execution or any other process issued, conveyed his interest in the property to F., there was no way by which a lien could be obtained upon the property by execution or otherwise, and any decree made must be fruitless, and the court should not make a decree which it was powerless to enforce. *Id.*

Held, that the fact that the plaintiffs were simple contract creditors only, and that the mortgagor had, prior to action brought, made an

assignment for the benefit of creditors generally, and that the plaintiffs were not attacking the assignment as well as the mortgage, did not debar them from the relief claimed. *Meriden Silver Co. v. Lee*, 2 O. R. 451, followed. *S. C.*, 9 O. R. 185.—*Ferguson*.

### FRAUDULENT JUDGMENT.

In an action by a creditor against a shareholder for unpaid stock, in a company incorporated under 32-33 Vict. c. 13, (Dom.):—*Held*, (Burton, J. A., dissenting), that the shareholder under a plea that the judgment was obtained by fraud, was entitled to set up as a defence that the company had not in the original suit been served with process, under section 50, the person served as secretary not being such officer. *Per* Burton, J. A. Such an omission was an irregularity only which must be moved against promptly, and could not be the subject of a plea; but that fraud or collusion between the plaintiff and the company or its officers would avoid the judgment, and could be set up by plea, but was not shown by the evidence here. *Harrey v. Harrey*, 9 A. R. 91.

The plaintiffs by their agent, Patrick R., in April, 1877, procured a judgment to be signed against Peter R., the defendant, who, for purposes of his own, suffered the judgment to go by default. No execution was ever issued thereon. After the death of Peter, the plaintiffs assigned the judgment to the wife of Patrick, who paid them \$50 therefor; and, on her application, Armour, J., made an order allowing execution to issue against the executors of Peter. The executors then applied to set aside the judgment, as having been fraudulently obtained, and to be allowed to defend the action, or for such other order as should seem just; and upon such application, Wilson, C. J., made an order setting aside the judgment and all proceedings in the action, and directing the plaintiffs to repay the \$50. This order was affirmed on appeal by the Common Pleas Division. *Per* Hagarty, C. J. O., and Osler, J. A.:—The judgment should merely be set aside and the executors allowed in to defend. *Per* Burton, J. A.:—The executors cannot be heard to allege their testator's fraudulent purpose; they are estopped from confining the operation of the judgment within the limit of his intended fraud; and the judgment should be allowed to stand. *Per* Patterson, J. A.:—The judgment should not be set aside, but the order of Armour, J., should be rescinded, and it should be declared that Patrick's wife as assignee of the judgment, was not entitled to issue execution, because the judgment was procured by Patrick, her husband, and suffered by Peter, for a fraudulent purpose, of which she had notice when she took the assignment. *Schroeder et al. v. Rooney*, 11 A. R. 673.

See *MacDonald v. Crombie*, 11 S. C. R. 107, p. 287; *Ficht v. Galloway*, 5 O. R. 502, p. 112.

### FRAUDULENT REMOVAL OF GOODS.

See CRIMINAL LAW.

### FRAUDULENTLY DEPRIVING OF THE USE OF PROPERTY.

See CRIMINAL LAW.

### FREIGHT.

Contract to deliver goods at a named point Liability for extra freight upon change of destination at instance of purchaser. See *Symmers v. Livingstone*, 10 A. R. 355.

### GAMING.

The defendant placed in his shop window a globular glass jar, securely sealed, containing a number of buttons of different sizes. He offered to the person who should guess the number nearest to the number of buttons in the jar, a pony and cart, which he exhibited in his window stipulating that the successful one should buy a certain amount of his goods:—*Held*, that as the approximation of the number of buttons depended upon the exercise of judgment, observation, and mental effort, this was not a "mode of chance" for the disposal of property within the meaning of the Act:—*Quere*, whether defendant should not get the costs of quashing conviction made to test the law in such a case. *Regina v. Jamieson*, 7 O. R. 149.—*Rose*.

D. and H. agreed to match a colt owned by D. against a colt owned by S. Under the agreement the stakes were deposited with P., whose default being made by D., handed over the amount of D.'s deposit to H., although D. had previously demanded it back. D. is now bringing this action against H. and P. to recover the amount of the deposit:—*Held*, that the race was an illegal one under 13 Geo. II. c. 19, one of the participants not being the owner of the horse he bet upon, and therefore D. could not recover back from H. the deposit money, being himself in *pari delicto*:—*Held*, however, that inasmuch as P. should have handed back D.'s deposit on demand made before disposal, D. could now recover the amount of the same from P. *Davis v. Hewitt et al.*, 9 O. R. 435.—*Boyd*.

The Act 40 Vict. (C.) c. 31, intitled an Act for the repression of betting and pool selling, does not forbid betting, and does not apply to stakeholders in any of the three cases mentioned in section 2. *Regina v. Dillon*, 10 P. R. 352.—*Osler*.

A cheque given in settlement of losses at matching coppers is a note of hand given in consideration of a gambling debt within s. 53, subss. 3, R. S. O. c. 47, and such a security is void under 9 Anne, c. 14, even in the hands of a bona fide holder for value. *In re Summerfeldt v. Worts*, 12 O. R. 48.—*Q. B. D.*

### GARNISHMENT.

See ATTACHMENT OF DEBTS.

### GATES.

See RAILWAYS AND RAILWAY COMPANIES.



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## GENERAL SESSIONS.

## See SESSIONS.

## GIFT.

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See *Symmers* v.

The evidence shewed that the husband had purchased a piano, and had made a present of it to his wife by putting it in the house where they lived, and subsequently recognizing her right to it:—Held, that the piano did not form part of the wife's separate estate, as the husband could not at common law make a gift inter vivos of this description of property, so as to prevent its passing to his personal representatives; and that there was no evidence of intention on his part to constitute himself a trustee of the piano for his wife. 50. R. 516.—Cameron.

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*Regina v. Jamieson*.

W. G. gave to his wife, M. G., a bond conditioned as follows: "That my executors shall pay M. G. \$200 in one year, and \$200 in two years after my decease, and these payments to be made as above stated to M. G. I bind myself to make full provision for in my will to be hereafter made. And should I not make a will, this shall be full authority to my executors to make such payments. When my executors fulfil the above named obligation by making said payments the above obligation to be null and void, otherwise to remain in full force and virtue." W. G. died leaving a will, which, however, did not specially mention the above obligation. M. G. alleged that she had left the home of the testator for good cause, and that this bond was given to induce her to return and live with him, which she did; but the learned judge found otherwise, and that the bond was wholly without consideration in fact. M. G. now sued the executors of W. G. for the \$400 mentioned in the bond:—Held, that M. G. could not recover for that, if the action were considered as an action at law on the bond, the bond was void, since at law husband and wife could not contract; while if considered as a suit in equity it was equivalent to a suit for specific performance, or the enforcement of an imperfect gift, and in either case equity would not aid a volunteer, neither did the presence of a seal make any difference. Held, also, that the bond could not be regarded as a declaration of trust. *Glass v. Burt et al.*, 8 O. R. 391.—Ferguson.

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The widow of a testator claimed as a gift from her husband a promissory note payable to his order, but not endorsed by him. The evidence, in the master's office, on taking the accounts of the estate, shewed that the wife had taken possession of this and other notes belonging to her husband during his lifetime. The master at London found that under the circumstances appearing in the report of the case, 29 Chy. 443, the testator had intended the note to belong to the widow, and that it did not form part of the assets of the estate, which finding was reversed by the court (Blake, V.C.):—Held, per Spragge, C.J.O., and Morrison, J.A., (reversing the order then pronounced) that the evidence established a valid gift inter vivos. Per Burton and Patterson, J.J.—That even if the facts shewn in the evidence failed to establish a good gift inter vivos, the testator under the circumstances had constituted himself a trustee for his wife of the note. Per Burton, J.A.—The mere delivery of such a note, not endorsed, could not take effect as a gift inter

vivos. Per Spragge, C.J.O.—There is no distinction in this respect between a gift inter vivos and a donatio mortis causa. *Tiffany v. Clarke*, 6 Chy. 474, remarked upon by Spragge, C.J.O., *Re Murray—Purdam v. Murray*, 9 A. R. 369.

A verbal gift of personal chattels does not confer any property on the donee, if there be no actual delivery to him. Therefore, where the mother of the defendant, while on her death-bed, gave to another son, J., the key of a drawer containing a mortgage in her favour executed by the defendant, directing J. to give the instrument to the defendant in the event of her not again seeing him, and the defendant was subsequently summoned by telegraph to see his mother, and he thereupon again visited her, when she told him that his mortgage was in the drawer, and that when he went home he should take it with him; but he did not on this occasion take possession of or see it, and after the mother's death (intestate) J., as directed by her, handed the mortgage to the defendant:—Held, affirming the judgment of Boyd, C., 8 O. R. 516, that there had not been such a complete delivery of the security as to constitute a gift inter vivos or a donatio mortis causa, and therefore that the money due on the mortgage formed part of the personal assets of the deceased. *Watson v. Bradshaw*, 6 A. R. 656, observed upon. *Travis v. Travis*, 12 A. R. 438.

The mother had signed and given to defendant a year before her death a receipt for interest on the mortgage, and had endorsed a similar receipt on the mortgage, but no money was paid:—Held, a valid gift of the interest. *S. C.*, 8 O. R. 516.

## GOODS.

- I. ASSIGNMENT OR MORTGAGE OF—See BILLS OF SALE AND CHATTEL MORTGAGES.
- II. GIFT OF—See GIFT.
- III. LETTING CHATTELS FOR HIRE—See HIRE OF CHATTELS.
- IV. CARRIAGE OF—See CARRIERS.
- V. SALE OF—See SALE OF GOODS.
- VI. WARRANTY OF—See WARRANTY.

## GUARANTEE AND INDEMNITY.

- I. OPERATION OF THE STATUTE OF FRAUDS, 298.
- II. CONSTRUCTION OF CONTRACT, 299.
- III. DETERMINATION OF CONTRACT, 300.
- IV. MISCELLANEOUS CASES, 300.
- V. AS BETWEEN PRINCIPAL AND SURETY—See PRINCIPAL AND SURETY.
- VI. WARRANTY—See WARRANTY.

## I. OPERATION OF THE STATUTE OF FRAUDS.

A. M. was carrying on business as a brewer when, owing to financial difficulties, he left, and S. M., his brother, a large creditor, took charge thereof. The plaintiff claimed that at this time

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there was a large sum due him for wages under a special agreement made with A. M.; and that S. M. agreed, if he would remain, to pay him the past wages then due him, and like wages for the future:—Held, that the agreement by S. M. to pay such past wages being merely a collateral promise A. M. remaining liable, and not being in writing, could not be enforced:—Held, also, that, on the evidence as to the amount of wages, each party swearing to a different agreement, and the other evidence being contradictory, the fair inference was that the parties' minds were never ad idem, and the recovery could only be on the quantum meruit. *Hoener v. Merner et al.*, 7 O. R. 629—C. P. 1.

In an action for the price of goods supplied by the plaintiffs to C. A. E., it was proved that the plaintiffs received in an envelope, addressed to their firm, the following letter: "Lake Superior, Ont., July 4th, 1883. Gentlemen,—I beg to inform you that I have assumed all liabilities of the S. P. Co. lately carried on by Mr. C. A. E., and am responsible to the amount contracted by him up to July 24th, 1882. Kindly ship chases immediately. Respectfully yours, (Signed), C. J. S." The envelope was lost, but its receipt and the address on it were proved:—Held, a sufficient agreement in writing to satisfy the statute for that the address on the envelope referring to the "gentlemen" within shewed that the plaintiffs were the persons guaranteed. *Richard et al. v. Stillwell*, S. O. R. 511.—Boyd.

## II. CONSTRUCTION OF CONTRACT.

The defendant R. contracted with the plaintiffs to deliver on their vessels at Montreal a large quantity of deals, and he delivered in 1877, all but 108 standard hundreds. These could not be shipped till the spring of 1878, and R. required in the meantime to receive payment for them. He had in his yard at Ottawa more than the required quantity of deals; and in place of then separating and delivering to the plaintiffs the 108 standards, he procured his son to give a storage receipt under 34 Vict. c. 5 (Dom.) acknowledging the receipt from the Ontario Bank of 108 standard hundreds of deals specifying the qualities required by the contract. The bank thereupon gave a guaranty to the plaintiffs that those deals should "be satisfactorily culled next spring previous to shipment, and that any question arising as to the same shall be settled in the manner usual in Quebec, viz.: Messrs. D. & Co. for purchasers, and Messrs. C. & R., for Mr. R., to agree upon a sworn culler to act in the interests of both parties." Thereupon the plaintiffs paid for the deals, and the bank received the money. In the spring of 1878, R. forwarded 108 standards to Montreal by two barges, being urged to expedition in so doing by the plaintiffs: and 60 standards were loaded on vessels of the plaintiffs, which sailed with them to England. The quality of the remaining 48 standards was objected to and they were landed at Montreal, and there culled and found deficient in quality. Messrs. C. & R., agents at Montreal for the defendant R., verbally agreed with the plaintiffs, after the 60 standards had been shipped, that the quality of the 48 standards should be taken to be the average of the whole 108:—Held, (*Sprague, C. J. C. dissenting.*) that the guaranty given by the bank only required that the plaintiffs should

be satisfied with the culling at R.'s yard in Ottawa, and that no objection having been made there the guaranty was satisfied. But held also, that the bank was not bound by the agreement made at Montreal by C. & R., and even if the culling were to have been at Montreal the shipment of the 60 standards having rendered it impossible to settle the question in difference in the manner agreed upon, the bank would have been discharged. *Dobell et al. v. Ontario Bank et al.*, 9 A. R. 484.

## III. DETERMINATION OF CONTRACT.

By an agreement under seal made in April, 1879, the defendant guaranteed to C. & Sons, on the members for the time being forming such firm, the price of any goods supplied by C. & Sons to one Q. to the amount of \$5,000, and which he agreed should be a continuing guarantee. C. died in September, 1881, after which the sons, who were named as executors in his will, carried on the same business under the like firm name until December, 1882, when the assets of the partnership were transferred to the plaintiffs, a joint stock company. Q. continued to obtain goods from the sons, and the plaintiffs since the formation of the joint stock company, until the spring of 1883. Meanwhile, and on the 5th of April, 1882, the defendant being dissatisfied with the manner in which Q. was conducting his business, wrote to the firm forbidding them to supply any more goods to Q. under such guarantee:—Held, (1), affirming the judgment of Rose, J., 5 O. R. 189, that such notice put an end to defendant's liability for any goods subsequently supplied to Q.; but—Held, (2), reversing the judgment of Rose, J., that the death of C. had not that effect, Burton, J. A., dissenting. *The Cosgrave Breeding and Mating Co. of Toronto v. Stairs*, 11 A. R. 156.

## IV. MISCELLANEOUS CASES.

See *Molson's Bank v. Turley*, 8 O. R. 293, p. 278; *O'Donohoe v. Robinson et al.*, 10 A. R. 622, p. 251; *Wykl et al. v. Clarkson*, 12 O. R. 589, p. 36.

## GUARDIAN.

See INFANT.

## HABEAS CORPUS.

Held in this case that the discharge of the plaintiff from custody on habeas corpus was not a quashing of the conviction. *Hunter v. Gibbons*, 7 O. R. 735—Q. B. D.

The defendant L., a magistrate, had convicted the plaintiff for being the keeper of a bawdy house, and sentenced her to six months' imprisonment. Plaintiff, after undergoing two days' imprisonment, was released on bail, pending an appeal to the sessions. The appeal was dismissed and plaintiff subsequently arrested upon a warrant issued by the defendant L. under advice of defendant H. the County Crown Attorney. Upon return to habeas corpus she was discharged from custody under the latter warrant.

upon the ground that the two counts prior to her arrest were under a third, and she was aggrieved by the decision. In an action for the penalty of the habeas corpus, reversing the decision, that the Act, 31 Car. 2, in which the plaintiff was in execution: execution, is the discharge of the plaintiff from custody, and the order and provision in the case after the sessions, and the plaintiff in direct imprisonment without making a return. *Aras*, Q. B. D.

The course of a habeas corpus under a defect of a return.

See *In re S.*

See *Dunlap*.

HA.

The plaintiff purchased the horse a half breed, signed to plaintiff a child of a horse, and the plaintiff was worth the value of the horse, entitled to the amount paid for the so-called horse, defendant, who had received.

See *M.*

HE.

HIGH.

I. CONSTITUTION.

II. POWER.

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#### CONTRACT.

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A., dissenting  
Co. of Toronto

#### CASES.

8 O. R. 293, p.  
10 A. R. 622,  
D. R. 589, p. 36

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Munter v. Gill

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upon the ground that it did not take into ac-  
count the two days' imprisonment she had suffered  
prior to her appeal. Thereupon she was detained  
under a third warrant, on which nothing turned,  
and she was again arrested under a fourth warrant  
issued by defendant L. upon the original convic-  
tion. In an action brought by the plaintiff for  
the penalty of £500 awarded by the 6th section of  
the habeas corpus Act, 31 Car. II. c. 2:—Held,  
reversing the judgment of Cameron, C.J., at the  
trial, that the 6th section of the habeas corpus  
Act, 31 Car. II. c. 2, has no application to a case  
in which the prisoner is confined upon a warrant  
in execution:—Held, also, that the warrant in  
execution, issued by the convicting justice upon  
the discharge of the prisoner from custody for  
defects in the former warrant, was the legal  
order and process of the court having jurisdic-  
tion in the cause:—Sembles, that the warrant is-  
sued after the dismissal of the appeal by the  
sessions, and which followed the original convic-  
tion in directing imprisonment for six months,  
without making allowance for the two days' im-  
prisonment already suffered, was not open to ob-  
jection. *Arscott v. Lilley et al.*, 11 O. R. 153—  
Q. B. D.

The course to be taken by the court on return  
of a habeas corpus, shewing prisoner detained  
under a defective warrant in execution of a con-  
viction of a justice of the peace discussed.—  
*Id.*

See *In re Smart Infants*, 11 P. R. 482, p. 321.

#### HABENDUM.

See *Dunlap v. Dunlap*, 6 O. R. 141, p. 212.

#### HALF-BREED'S RIGHTS.

The plaintiff had agreed with the defendant to  
purchase the claim to land scrip in Manitoba, of  
a half breed, and defendant procured to be as-  
signed to plaintiff the claim of one alleged to be  
a child of a half-breed. This proved to be erro-  
neous, and the scrip which had been issued to  
him was worthless:—Held, affirming the judg-  
ment of the County Court that the plaintiff was  
entitled to recover from the defendant the  
amount paid by the plaintiff for the purchase of  
the so-called right; the plaintiff to assign to the  
defendant, quantum valeat, the land scrip he  
had received. *Burns v. Young*, 10 A. R. 215.

#### HAWKERS.

See *MUNICIPAL CORPORATIONS.*

#### HEARSAY EVIDENCE.

See *EVIDENCE.*

#### HIGH COURT OF JUSTICE.

I. CONSTITUTION OF COURT, 302.

II. POWERS OF SINGLE JUDGE, 303.

#### III. DIVISIONAL COURT.

1. *Applications and Appeals to.*

(a) *Generally*, 303.

(b) *Practice*, 304.

IV. POWERS OF LOCAL JUDGE—*See PRACTICE.*

V. TRANSFERRING CAUSES FROM ONE DIVI-  
SION TO ANOTHER, 304.

VI. EXCLUSIVE JURISDICTION OF COURT OF  
CHANCERY—*See TRIAL.*

VII. TRIAL—*See TRIAL.*

#### I. CONSTITUTION OF COURT.

An indictment was found against the defen-  
dants in the High Court of Justice at its sittings  
of Oyer and Terminer and Gaol Delivery, and on  
being called upon to plead the defendants demur-  
red to the indictment. A writ of certiorari  
was subsequently obtained by the defendants, in  
obedience to which the indictment, demurrer, and  
joinder were removed to the Queen's Bench Divi-  
sion. Upon the return the Crown took out a  
side-bar rule for a concilium, and the demurrer  
was set down for argument. A motion was made  
by the defendants to set aside the proceedings of  
the Crown on the ground that they should have  
been called upon to appear and plead *de novo* in  
the Division:—Held, Wilson, C. J., dissenting,  
that the Court of Assize of Oyer and Terminer  
and General Gaol Delivery is now, by virtue of  
the Judicature Act, the High Court of Justice;  
that the indictment was found, and the defen-  
dants appeared and demurred thereto in the High  
Court of Justice; and that it was not necessary  
to plead *de novo* to the indictment. *Regina v.*  
*Bunting et al.*, 7 O. R. 118.

Per Armour, and O'Connor, J.J.: The Supreme  
Court of Judicature is not properly a Court, and  
ought more properly to have been called the Su-  
preme Council of Judicature. The Divisions of the  
High Court are not themselves courts, but together  
constitute the High Court, which is thus divided  
for the convenience of transacting business; and  
the Judges sit as Judges of the High Court, and  
exercise the jurisdiction and administer the juris-  
diction of the High Court. *Id.*

The recognizance entered into by the defen-  
dants, on the removal of the proceedings to this  
Division, provided that they should "appear in  
this Court and answer and comply with any judg-  
ment which may be given upon or in reference to  
a certain indictment, &c., or upon or in reference  
to the demurrer to such indictment, and plead to  
said indictment if so required." Per Wilson, C. J.  
Sembles, that the practice and procedure before  
the Judicature Act should be maintained in its  
entirety; though possibly it might be varied by  
agreement. By the recognizance the defendants  
had not agreed to vary it, but they might there-  
under elect to appear and answer to the indict-  
ment or to appear and argue the demurrer; and  
they, being ready to appear and answer the in-  
dictment, would fully perform the condition of  
the recognizance by so doing. *Id.*

The election petition against the election and  
return of the respondent was entitled in the High  
Court of Justice, Queen's Bench Division, and  
was presented to the official in charge of the

office of the Queen's Bench Division, and filed and entered in the books of that office. A preliminary objection was taken that the High Court of Justice had no jurisdiction. Held, (Henry and Taschereau, J.J., dissenting), reversing the judgment of Cameron, J., that the Ontario Judicature Act, 1881, makes the High Court of Justice and its divisions a continuation of the former courts merged in it, and that those courts still exist under new names; and that the petition had not been irregularly entitled and filed. *West Riding, County of Huron Election—Mitchell v. Cameron*, 8 S. C. R. 126.

## II. POWERS OF SINGLE JUDGE.

Held, that a single judge, sitting as the court, has power to review the findings of an official referee upon a reference under sec. 48 O. J. Act. *Hill v. The Northern Pacific Junction R. W. Co.*, 11 P. R. 103.—Ferguson.

The judge who presides at the trial and pronounces judgment by default for the defendant in the absence of the plaintiff, has power under Rule 270 O. J. Act, when afterwards sitting as the court at Toronto, to set aside such judgment. *Ross v. Carscadden*, 11 P. R. 104.—Ferguson.

See *Synod v. DeBlauquiere*, 10 P. R. 11, p. 232.

## III. DIVISIONAL COURT.

### 1. Applications and Appeals to.

#### (a) Generally.

In moving to quash a by-law, the practice having been adopted of applying to a judge sitting alone, an objection that the application should have been to the Divisional Court was not entertained; but such an application if required to be made to the Divisional Court, must be to the common law Divisional Courts, and not to the Chancery Divisional Court. *In re Funston and the Corporation of Tilbury East*, 11 O. R. 75.—O'Connor.

The Divisional Court ought not to entertain applications to quash by-laws, which should be made to a single judge. *Lambry v. The Corporation of the City of Ottawa*, 11 P. R. 442—C. P. D.

This action was not tried, but was referred to the master, further directions and costs being reserved. After report made the case was heard on further directions before Proudfoot, J. :—Held, that the case could not be reheard before the Divisional Court, as the proceedings taken could not be regarded as the trial of an action within the meaning of Rules 317 and 510 O. J. Act. *Wansley v. Smallwood*, 10 P. R. 233—Chy. D.

When a case is improperly set down to be reheard, a substantive motion should be made to strike it out. *Ib.*

Held, notwithstanding s. 28, sub-ss. 2 and 3, O. J. Act, that the Divisional Court had jurisdiction to hear an appeal from the order of Armour, J., in this case having regard to the language of Rule 254, O. J. Act, and of the order itself. *Ball v. The North British Canadian Loan and Investment Co. (Limited) et al.*, 11 P. R. 83—C. P. D.

An order of a judge sitting at the assizes changing the place of trial on leave given by the

Master in Chambers, who refused the application, to so appeal from his decision was held to be an order of the judge and not of the High Court, and could therefore be reviewed by the Divisional Court. *The Sarnia Agricultural Implement Manufacturing Co. v. Perdue*, 11 P. R. 224—C. P. D.

See *Close v. Exchange Bank*, 11 P. R. 186, p. 147.

#### (b) Practice.

An objection that a notice of motion given for a sittings of the Divisional Court, and served in time to be set down during that sittings, could not be set down in the following sittings, was overruled. *Brassett v. McEwan et al.*, 10 O. R. 179.—C. P. D.

The decision appealed from was given on the 14th and the notice of appeal on the 26th November, the first day of Michaelmas Sittings being the 17th November :—Sembly, that this was an appeal from a judge, and not a substantive motion to rescind his order, and if so, and Rule 414 was to govern, the appeal was too late; but :—Held, even so, that the court would extend the time, as the merits were with the appellant. *McLaren et al. v. Marks*, 10 P. R. 451.—Q. B. D.

The judgment at the trial was pronounced on the 19th June, 1885, but was not drawn up and settled till the 11th September. The sittings of the Chancery Divisional Court (to which the defendant wished to appeal) began on the 3rd September :—Held that the time for appealing under Rule 523 began to run from the 19th June, and that it was not extended by the neglect to draw up the judgment, although, as the judgment was not drawn up, the cause could not be set down under Rule 522. But, as there was a bona fide intention to appeal, instructions had been given, the defendant lived abroad, in Texas, the judgment was complex, and there were only twelve days exclusive of vacation during which it could have been settled, leave to set the cause down was granted on payment of costs. *Hickey v. Storer*, 11 P. R. 88.—Chy. D.

## V. TRANSFERRING CAUSES FROM ONE DIVISION TO ANOTHER.

Since Rule 545, O. J. Act, an action is not to be transferred from one Division of the High Court of Justice to another, except on very strong grounds. *Masse v. Masse* 10 P. R. 574.—Boyd.

See *The Corporation of the Township of Muskoka and the Corporation of the Village of Gravenhurst*, 6 O. R. 352, p. 15. See also *Pawson et al. v. The Merchants Bank of Canada et al.*, 11 P. R. 72; *Herring v. Brooks*, 11 P. R. 15.

## HIGHWAY.

See WAY.

## HIRING.

### I. CHATTELS, 305.

### II. OF EMPLOYEES—See MASTER AND SERVANT.



a witness stated that in the fall of 1882, he had a conversation with the plaintiff, who, referring to some girls who visited his house, said he was not going to marry those who wanted his house, but the girl who wanted him; and on witness saying he supposed this was the plaintiff, the defendant answered "yes." The witness stated that in the next spring, or the following one, he had a further conversation with defendant, when defendant said he was either going to rent or sell his house or get married, when witness said he supposed plaintiff and defendant would soon make a match, to which the defendant made no reply. At the trial it was objected that there was no evidence to corroborate the plaintiff's evidence as to the alleged promise, and that the action was barred by the Statute of Limitations. The learned Judge overruled the objection, and left the case to the jury. Held, that the action was not maintainable. Per Cameron, C. J.—There was evidence to go to the jury corroborative of the promise stated by plaintiff; but, per Cameron, C. J., and Rose, J., the action was barred by the Statute of Limitations, the latter expressing no opinion as to the corroborative evidence. Per Galt, J., without dissenting as to the Statute of Limitations, the plaintiff's evidence was not sufficiently corroborated. *Costello v. Hunter*, 12 O. R. 333.—C. P. D.

## II. MARRIAGE.

By English law as adopted in this Province in 1792, marriage with a deceased wife's sister was not ipso facto void, but was esteemed valid for all civil purposes, unless annulled during the lifetime of the parties. Such remained the law here until 45 Vic. c. 42, (Dom.), which removed all disabilities. *Re Murray Canal—Lawson v. Powers*, 6 O. R. 685.—Boyd—Chy. D.

## III. MARRIAGE SETTLEMENTS.

In a marriage settlement it was provided that "from and after the decease of the survivor of them," the said husband and wife, the lands settled should be held "upon trust for all or any one or more of the children of the said intended marriage \* \* but if there shall be no child of the said intended marriage, in trust for the said W. K. S. (husband) and his heirs absolutely after the decease of M. M. S. (wife) if he shall survive her, but if he shall die in her lifetime, then" to be held in trust "for such person \* \* as he the said W. K. S. by any deed or deeds with power of revocation, and new appointment to be by him signed \* \* or by his last will and testament in writing, or any codicil thereto \* \* shall direct and appoint \* \* W. K. S. predeceased his wife, leaving no children. By his will he devised to his wife all his real and personal estate, and proceeded as follows: "I do also transfer unto her all the powers vested in me to bequeath, convey, execute by will or otherwise, all or any of certain properties conveyed to her by deed of settlement \* \* M. M. S. subsequently appointed the lands to her own use, and made a sale of part of them. On the statement of a special case for the opinion of the court as to whether the purchasers should be compelled to carry out their purchase:—Held, that the will of W. K. S. was not an execution

of the power but a valid delegation of it to his wife; that an appointment in favour of herself could only be properly made in pursuance of the power by a deed, with power of revocation, or in favour of another by will; and that a purchaser from her under an execution of the power by deed, would not be compelled to accept the title because of its revocable character. *Smith v. McLellan*, 11 O. R. 191.—Boyd.

On 28th June, 1876, L. et al. sold to M. T. a property for \$12,250, of which \$3,789 were paid in cash. On 16th June, 1879, E. T., daughter of M. T., married J. K., and in their contract of marriage M. T. made a donation to his daughter, E. T., of certain property of considerable value, and remained with no other property than that sold to him by L. et al. In July, 1881, L. et al. brought an action to set aside the gift in question, claiming that, the property sold having become so depreciated in value as to be insufficient to cover their claim for the balance remaining due to them and secured only by the property so sold, the gift in this marriage contract had reduced M. T. to a state of insolvency, and had been made in fraud of L. et al., and that at the time the gift was made M. T. was notoriously insolvent. M. T. pleaded, inter alia, denying averments of insolvency, fraud, or wrong-doing. The only evidence of the value of the property still held by M. T. at the date of the donation, 16th June, 1879, was the evidence of an auctioneer, who merely spoke of the value of the property in November, 1881, and that of a real estate agent, who did not know in what condition the property was two years before, but stated that it was not worth more than \$6,000 in November, 1881, adding that he considered property a little better now than it was two years before, although very little changed in price:—Held (reversing the judgment of the court below), that in order to obtain the revocation of the gift in question, it was incumbent on the plaintiffs to prove the insolvency or deconiture of the donor at the time of the donation, and that there was no proof in this case sufficient to show that the property remaining to the donor at the date of his donation was inadequate to pay the hypothecary claims with which it was charged. *Treacy v. Liggett*, 9 S. C. R. 411.

See *Ferris v. Ferris*, 9 O. R. 324 p. 213. See also *Hughes v. Rees*, 5 O. R. 654.

## IV. WIFE'S PROPERTY, RIGHTS AND LIABILITIES.

### 1. Separate Estate.

The defendant's first husband died in 1870, and she contracted a second marriage in 1871. This action was before the Married Women's Property Act, 1884, was passed:—Held, reversing the judgment of Osler, J. A., 6 O. R. 581, that the defendant's right to unassigned dower in the lands of her first husband was not separate estate, but was property falling within R. S. O. c. 125, s. 3, and she not having the jus disponendi without her husband's concurrence, her interest was not liable to be sold under execution against her. *Douglas v. Hutchison*, 12 A. R. 110.

Quere, per Patterson, J. A., whether a writ of fieri facias is the appropriate remedy for reach-

ing the separate property. See however *per Osler, J. A.*

See *Southan* 47; *Re Dunlop*

### 2. Conveyance.

Where a ra purchase of a woman, in the that the conju see that B. ha and inasmuch ly inadequate pos mentis, an taken of her, aside. B's n land was held that the conec tract was un him to join in *The Ontario d* 380.—Ferguso

The real es after March 2 the time of he ner during h her without th her contracts binding upon band. *1b.*

J. H., by h vised certain for life, with soon after ma 1880, leaving came of age i one of the chi and C. in 1870 heard of after convey her in concurrence o S O. R. 536.—

In 1834, C. to convey to of land grante conveyance w the usual cert the deed. T. conveyed to claimed. In sons of C. A. of the land u ment with th the whole lot to them until ever, the sons perty, and cut Held, (revers 2 O. R. 352) possession or lot to prevent S. O. ch. 127 which such v Osler, J. A., 11 A. R. 228.

3. Reden See *Caane*



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to accept the  
acter. *Smith*

ing the separate property of a married woman.  
See however *Beemer v. Oliver*, 10 A. R. 656, 661,  
per *Osler, J.A.* *Ib.*

See *Southam v. Ranton et al.*, 9 A. R. 530, p.  
17; *Re Dunbrill*, 10 P. R. 216, p. 315.

## 2. Conveyance by Wife of her Real Estate.

Where a railway company contracted for the purchase of certain land with B., a married woman, in the absence of her husband:—Held, that the company were under no obligation to see that B. had independent advice in the matter; and inasmuch as the price seemed not to be grossly inadequate, and B. appeared to be fully *compos mentis*, and no unfair advantage having been taken of her, the agreement could not be set aside. B.'s marriage took place in 1876, and the land was held by her to her separate use:—Held, that the concurrence of her husband in the contract was unnecessary, nor was it necessary for him to join in the conveyance. *Bryson et al. v. The Ontario and Quebec R. W. Co. et al.*, 8 O. R. 380.—*Ferguson*.

The real estate of a married woman, married after March 2nd, 1872, whether owned by her at the time of her marriage, or acquired in any manner during her coverture, may be conveyed by her without the concurrence of her husband; and her contracts respecting such real estate are binding upon her without the joinder of her husband. *Ib.*

J. H., by his will dated April 14th, 1874, devised certain property to his daughter, M. A. J., for life, with remainder to her children, and died soon after making the will. M. A. J. died about 1880, leaving five children, the youngest of whom came of age in 1884. Before the death of J. H., one of the children, M. J. J., married one C., and C. in 1870 deserted his wife and had not been heard of afterwards:—Held, that M. J. C. could convey her interest in the property without the concurrence of her husband. *Re Coulter et al.*, 5 O. R. 536.—*Ferguson*.

In 1834, C. A., a married woman, purported to convey to one T., in fee, the east half of a lot of land granted to her by the Crown, but the conveyance was invalid by reason of the want of the usual certificate by justices of the peace on the deed. T. never took possession, but in 1852 conveyed to H., through whom the plaintiff claimed. In or about the year 1866, the two sons of C. A. went and resided on the west half of the land upon the understanding and agreement with their mother that they were to have the whole lot, but no conveyance was executed to them until 1875. During the interval, however, the sons paid the taxes on the whole property, and cut timber at times on the east half:—Held, (reversing the judgment of the Q. B. D., 2 O. R. 352) that this was a sufficient "actual possession or enjoyment" of the east half of the lot to prevent the operation of section 13 of R. S. O. ch. 127 (36 Vic. ch. 18, s. 12), by means of which such void deed would be rendered valid. *Osler, J.A.*, dissenting. *Elliott v. Brown et al.*, 11 A. R. 228.

## 3. Redemption of Husband's Mortgage.

See *Casner v. Haight et al.*, 6 O. R. 451.

## 4. Separate Trading.

In an interpleader issue to try the right to certain goods seized under an execution against A. and claimed by B., his wife, it appeared that since their marriage a store business had been carried on in the name of the wife, and that frequent trades and transactions in real estate had also taken place in her name, but that in most of them the husband was the bargainer, and it was only when the bargains had to be carried out that the wife appeared in them; that the husband kept the store books, which she said she did not know much about, as she was no scholar; that the husband made nearly all the purchases of stock, and sold goods, and spoke and acted as if he were the owner; that he was not in receipt of wages, but took what money he wanted out of the store when he pleased, and in the transaction out of which the judgment and execution arose under which the stock was seized, he opened the negotiation by a letter signed by himself, referring to the property he offered in trade as his property, and when the bargain was closed took a deed of the store in his own name, and gave back a mortgage and his own note for the balance due. The jury, in the face of the judge's charge in favour of the execution creditor, found that the stock was the property of the wife, that she did not act fraudulently, and that she carried on business separate from her husband. Upon a motion to the Chancery Divisional Court to set aside the verdict, and to enter a verdict for the defendant, or for a nonsuit, or for a new trial, on the ground that the verdict was contrary to the evidence and to the direction of the judge, and perverse, and that it was against the weight of the evidence, it was:—Held, that the business was not one protected by R. S. O. c. 125, s. 7; that the verdict could not be sustained; and under Rule 321, O. J. Act and R. S. O. c. 50, s. 383, it was set aside and judgment entered for the defendant. *Murray v. McCallum*, 8 A. R. 277, referred to and distinguished. *Campbell v. Cole*, 7 O. R. 127.—*Chy. D.*

The plaintiff, a married woman, carried on business as an hotel-keeper, and owned the chattels in the hotel. The defendant, her husband, interfered with the plaintiff in her business by taking the receipts, giving orders to servants, and maltreating the plaintiff. An injunction was granted restraining the defendant from interfering in the business, or with the servants, or agents, or removing any of the plaintiff's chattels:—Semble, that, if asked for, an injunction might also have been granted excluding the defendant from the hotel under the circumstances. *Donnelly v. Donnelly*, 9 O. R. 673.—*Rose*.

## 5. Joint Liability of Wife for Husband's Contracts.

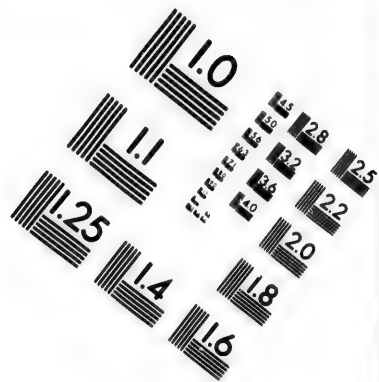
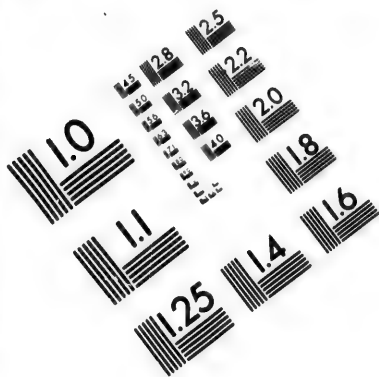
Where the plaintiff proved a joint wrongful occupation and conversion of the rents and profits of his land by a husband and wife:—Held, that the husband and wife were jointly liable to the plaintiff, and the plaintiff was entitled to recover against the separate property of the wife, for it could not be inferred that the latter was acting under the direction or coercion of her husband so as to exempt her from liability. *Barker v. Westover et al.*, 5 O. R. 116.—*Boyd*.

p. 213. See

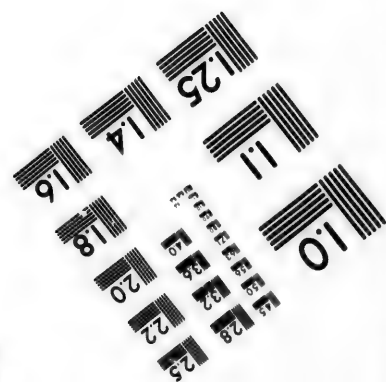
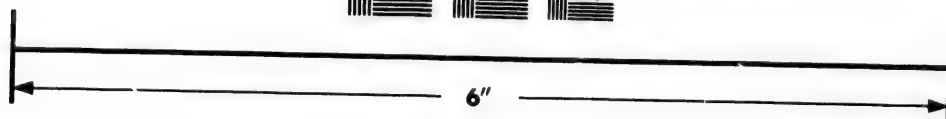
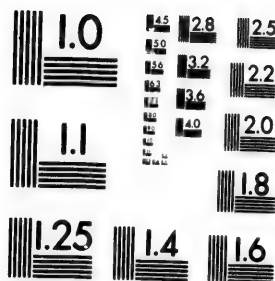
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Plaintiff agreed with J. R. to build a house on certain land for \$850. After building the house he discovered that the land belonged not to J. R. but to J. R.'s wife, who, at the time of the agreement, was an infant, and was in no way a party to it. Afterwards J. R. and his wife sold and conveyed the land and house to M., an innocent purchaser. The plaintiff was only paid a portion of the \$850, and now brought this action to recover the balance from the wife of J. R., or the amount by which the building had enhanced the value of the land:—Held, that inasmuch as there was no property or fund transferred or settled upon the wife that would have been liable to seizure by a creditor, the plaintiff could not recover against her. *Kincaid v. Read et al.*, 7 O. R. 12.—Ferguson.

Held, that a married woman, though married before May 4th, 1859, was not bound by a covenant of her husband, entered into by him for himself, his heirs and assigns, as lessor of certain lands, to pay at the expiration of the lease for a certain malthouse which the lessee was to have liberty to erect on the demised premises, though the reversion had been assigned to her husband and another as trustees for her, in such a way that she had the entire beneficial interest, and though the covenant ran with the land:—Held, also, that a claim on behalf of the said trustees for rent in arrear and damages for non-repair was not matter of set-off against damages recovered against the husband for breach of his covenant to purchase the malthouse, though he was one of the trustees, they acting in matters arising in the same right. *Fraser et al.*, 12 O. R. 459.—Ferguson.

#### 6. Judgment and Execution against Wife.

The original process in the action was served upon the defendant, the married woman, personally; she swore that she handed it to her husband, but never authorized any one to act for her as solicitor. She was not proceeded against as a married woman. D., an attorney, appeared for her and her husband, and judgment was signed against both defendants by consent of D., as her attorney, on an order made in chambers in 1875. Execution was at once issued under the judgment, and the personal property of the female defendant was seized and sold by the sheriff without complaint from her. It appeared that at the time of the commencement of the suit the married woman had an interest in certain real estate which she and her husband conveyed away after action brought and before judgment. No affidavit from the male defendant nor from D., the attorney, was filed:—Held, that after the long lapse of time and under the circumstances shewn the judgment should not be set aside. *McLean v. Smith et al.*, 10 P. R. 145.—Dalton, Master.

Judgment under Rule 80.—See JUDGMENT.

See *Campbell v. Cole*, 7 O. R. 127, p. 310; *Douglas v. Hutchison*, 12 A. R. 110, p. 309.

#### VI. HUSBAND'S LIABILITY FOR WIFE'S NECESSARIES.

The defendant's wife, who had been supported by the plaintiff with the defendant's consent, re-

turned to her husband's home, but was turned out of the house by him, whereupon the plaintiff again took charge of and supported her:—Held, that the defendant, by turning his wife out of his house, sent her forth as his delegated agent to pledge his credit for the necessities of life suitable to her position, and that the plaintiff was therefore entitled to assert a claim against the defendant for his expenses in so supporting the defendant's wife. And such claim can be maintained up to the date of a judgment allowing alimony to the defendant's wife. *Hughes v. Rees*, 10 P. R. 301.—Hodgins, Master in Ordinary.

Held, that a foreign judgment for alimony, put an end to any implied liability on the husband's part to pay for his wife's maintenance subsequently to the date from which alimony was to be paid under such judgment. *S. C.*, 9 O. R. 198.—Proudfoot.

#### VII. ACTIONS BY AND AGAINST.

##### 2. Wife Suing by Next Friend.

In an action by a married woman commenced before the O. J. Act, it was held on demurrer that the plaintiff must sue by next friend, and an order was made accordingly. Subsequently, and after the passing of the O. J. Act, the next friend became insolvent. On an application to the Master in Chambers for the appointment of a new next friend, he made an order for such appointment, which was affirmed on appeal by Proudfoot, J., he holding that he was bound by the previous order: that even although under the O. J. Act, Rule 97, a married woman may sue in respect of her separate estate without a next friend, by Rule 484 this was not to apply to pending business. On appeal to the Divisional Court the judgment of Proudfoot, J., 10 P. R. 86, was affirmed. Per Rose, J., that there was no evidence to shew that the woman had separate estate when the order appealed from was made. *Webster et al. v. Leys*, 5 O. R. 599.—C. P. D.

##### 3. By Wife against Husband.

Held, (affirming the decision of Wilson, C. J., C. P.), a married woman can not only bring an action against her husband in her own name, but she can also compromise it, or deal with it as she pleases, just as any other suitor can; and if the plaintiff and defendant have agreed to certain terms in settlement of such a suit, such contract can be enforced against the defendant, by the plaintiff suing in her own name without a next friend. And so in the present case where, by way of compromise of such a suit, the parties to it agreed that the plaintiff should execute a proper deed of separation containing certain covenants by her, in return for which the defendant should convey to the plaintiff certain lands and pay certain moneys:—Held, that the plaintiff was entitled to specific performance of this agreement; that it was not the separation which was being enforced, but the performance by the defendant of his contract. *Vardon v. Vardon*, 6 O. R. 719.—Chy. D.

A woman, married to her husband in 1880 without marriage settlement, afterwards advanced certain moneys to him, which she now sought to recover as money lent. She failed, however,

to prove she could not. O. R. 224.

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In an action upon a divorce Circuit Court where he (plaintiff) notified of the domicile marriage a the marriage wife was that the e alleged by for divorce the decree, statement by our law wife's claim non-feasant defend the collusion of peaching the action. M.

Held, affirmed from v. Farnie, 43, that the domicile—and that Court had

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to prove a contract for re-payment:—Held, that she could not recover. *Hopkins v. Hopkins*, 7 O. R. 224.—Ferguson.

During the trial M. A. D. obtained leave to amend, and claimed to be allowed a sum of \$1,500, which she alleged she had given to her husband, the plaintiff, as a loan, and which was employed in the purchase of the property and building thereon:—Held, that as no contract for repayment was shewn, no security being taken and no attempt having been made to collect the amount, although many years had passed, the transaction could not be treated as a loan, and his wife could not recover or be allowed the amount so claimed. *Dufresne v. Dufresne et al.*, 10 O. R. 773.—Ferguson.

#### VIII. FOREIGN DIVORCE.

In an action for alimony the defendant relied upon a divorce granted on his own petition by the Circuit Court of St. Louis County, Missouri, where he then resided; the wife (the present plaintiff) having made no defence thereto though notified of the proceedings. It appeared that the domicile of the husband at the time of the marriage and of the divorce was Canadian, though the marriage was celebrated at Detroit, and the wife was an American citizen. It was proved that the evidence of desertion by the wife as alleged by the husband, and on which the decree for divorce was founded, was untrue:—Held, that the decree, having been obtained on an untrue statement of facts, and for a cause not recognized by our law, could not be set up as a bar to the wife's claim for alimony:—Held, also, that the non-feasance of the wife in failing to appear or defend the action for divorce did not amount to collusion on her part so as to estop her from impeaching the validity of the decree made in that action. *Magurn v. Magurn*, 11 A. R. 178.

Held, affirming the decision of the Court appealed from, 3 O. R. 178, and following *Harvey v. Farnie*, 5 P. D. 153; 6 P. D. 35; 8 App. Cas. 43, that the jurisdiction to divorce depends upon the domicile of the parties, that is of the husband—and that this being Canadian, the Missouri Court had no jurisdiction. *Ib.*

Per Hagarty, C. J. O.—There is no safe ground for distinction between domicile for succession, and for matrimonial purposes, or a domicile by residence. *Ib.*

#### IX. ALIMONY.

##### 1. When Granted.

In an alimony action the defendant in his defence alleged that he had refused, and still refused, to support the plaintiff by reason of her having committed adultery with M. At the trial it appeared that the plaintiff, on being charged by the defendant with adultery, and ordered to go away, left his house, though, before she actually departed, he forbade her to go. The defendant persisted in the charge of adultery, but did not attempt to prove it. The plaintiff proved none of the acts of violence alleged in her statement of claim:—Held, that the statements in the defence, taken in connection with the above facts, must be treated as sufficient proof of desertion on his part, and he must be taken to have

dispensed with the necessity for the plaintiff offering to return. *Ferris v. Ferris*, 7 O. R. 496.—Osler.

The defendant having, at the trial, after the plaintiff's evidence had been given, for the first time offered to take her back to his house:—Held, that the judgment for alimony should stand over for six weeks to see if this offer was carried out, and that the plaintiff was, in any event, entitled to her full costs of suit. *Ib.*

##### 2. Interim Alimony.

Held, that the principle which underlies all the decisions is, that the allotment of alimony pendente lite depends upon the marital relationship of the parties existing de facto. The Court exercises a discretion in granting or withholding alimony pendente lite which is regulated by the circumstances of each case. And the defendant in this action by his own act and conduct having clothed the plaintiff with the reputation of being his wife, although he denied the marriage, the decision of the Master awarding interim alimony was not interfered with. *Walker v. Walker*, 10 P. R. 633.—Boyd.

Held, that a wife was not entitled to interim alimony and disbursements where she sued on the ground of desertion, not alleging cruelty, and where the husband offered by his defence and by affidavit to resume cohabitation with her. *Snider v. Snider*—*Snider v. Orr*, 11 P. R. 140.—Boyd.

An order of a Local Master directing the defendant in an alimony action based upon desertion to pay interim alimony was affirmed, though the wife was in occupation of the defendant's homestead; she having established that she was in need of interim alimony, and the defendant not shewing that she was in receipt of any income from the farm. An order directing the defendant to pay forthwith interim disbursements was affirmed, except as to the counsel fee to be paid to the plaintiff's solicitor, who intended to act as counsel at the trial. *Lalonde v. Lalonde*, 11 P. R. 143.—Proudfoot.

##### 3. Costs.

An application to compel the defendant to pay the costs of the plaintiff's solicitors of an action for alimony. The action was settled before trial, the plaintiff returning to live with the defendant, and the defendant agreeing to pay the plaintiff's solicitors' costs:—Held, that before the Act 32 Vict. c. 18 (Ont.), (R. S. O. c. 40, s. 48), the defendant would have been liable to pay costs:—Held, under the wording of section 2 of the above Act, that the plaintiff had not failed to obtain a decree for alimony, and that the defendant is therefore liable to pay costs. *McCree v. Moore*, 10 P. R. 284.—Dalton, Master.

Pending an action for alimony, and before trial, the plaintiff returned to live with the defendant:—Held, that the defendant should pay only the cash disbursements of the plaintiff's solicitors. *Keith v. Keith*, 25 Chy. 110, considered. *Ringrose v. Ringrose*, 10 P. R. 299.—Proudfoot.—Affirmed Chy. Div., *Ib.* 596.

An order was made in an alimony suit for payment to the plaintiff, before the trial, of \$22.35,

on account of her disbursements for witness fees, and of \$40 on account of counsel fee:—*Quære*, whether the counsel fee should be paid in advance if the plaintiff's solicitor acts as counsel. *Ingram v. Ingram*, 10 P. R. 569.—*Ferguson*. See, also, *Magurn v. Magurn*, *Id.* 570; *Bradley v. Bradley*, *Id.* 571.

See *Ferris v. Ferris*, 7 O. R. 496, p. 314; *Lalonde v. Lalonde*, 11 P. R. 143, p. 314.

#### 4. Other Cases.

See *Vardon v. Vardon*, 6 O. R. 719, p. 312; *Hughes v. Rees et al.*, 9 O. R. 198, p. 312; *Magurn v. Magurn*, 11 A. R. 178, p. 313.

#### X. MISCELLANEOUS CASES.

Refusal of husband and wife to answer questions that might criminate each other in an action of libel. See *Millette v. Little*, 10 P. R. 265.

A petition was presented by the husband of D. to declare his wife a lunatic which was opposed by her. Pending the hearing of the petition D. assigned her separate estate for the benefit of her creditors. The court dismissed the petition. D.'s solicitor presented a petition for taxation of D.'s costs, and for payment by the assignee in priority to the claims of the creditors:—Held, that the costs of opposing the petition might be classed as necessities which the wife is liable to pay out of her separate estate, and for which that estate is liable in the hands of her assignee, but that they could not be put on the footing of maintenance. Such costs should be paid ratably out of the assets, and costs subsequent to the assignment should not rank in competition with creditors before the assignment. *Re Dumbrell*, 10 P. R. 216.—*Boyd*.

*Quære* whether a married woman can be one of the five persons required for the formation of a road company under R. S. O. c. 152. See *Hamilton and Flamborough Road Co. v. Townsend*, 13 A. R. 534.

Damages recoverable by husband for death of his wife through negligence of railway company under Lord Campbell's Act. See *Lett v. St. Lawrence and Ottawa R. W. Co.*, 11 A. R. 1; *S. C.* sub-nom *St. Lawrence and Ottawa R. W. Co. v. Lett*, 11 S. C. R. 422.

Appointment of husbands as trustees for their wives. See *McLachlin et al. v. Osborne et al.*; *Mayee v. Osborne et al.*, 7 O. R. 297.

Upon a petition under the Settled Estates Act, *Boyd, C.*, dispensed with the examination required by the Act of a married woman interested who lived out of the jurisdiction, but not one who lived within the jurisdiction. The Married Women's Property Act, 1884, (Ont.), does not apply to cases under the Settled Estates Act, where the woman had acquired the property before the passing of the former Act. *Re English*, 11 P. R. 198.—*Boyd*.

#### HYPOTHECATION.

On the 14th October, 1874, Mrs. R. sold to one Q. the south half of the cadastral lot No. 4679, in the city of Montreal, and on the same

day Mrs. C. sold him the north half of the same lot. On the 17th October, 1874, Q. sold to G. and to L. and R. three undivided fourths of the two properties en bloc for a sum of \$49,612.50, in deduction of which purchasers paid cash \$22,246.87½, and covenanted to pay the balance for Q. to Mrs. R. Mrs. R. was not a party to this last deed, and did not then accept the delegated debtors. In June, 1876, Mrs. R. sued G. et al. hypothecarily for sums due to her on the deed of sale by herself to Q., and thereupon G. abandoned (*délaissé en justice*) his undivided fourth of the said south half of lot No. 4679. On the 4th December, 1877, Mrs. R. accepted the delegation of payment, made in her favour by Q., in the deed of the 17th October, 1874, and afterwards brought the present action against G. for one-third part of the debt of \$27,356.68, with interest due her in virtue of said delegation of payment. G. contended that the acceptance of the delegation of payment being subsequent to the hypothecary action and his *délaissement*, was null and of no effect, and therefore he could not be sued for any portion of the money:—Held, that under these circumstances G. was relieved from personal liability under the delegation of payment, but only to the extent of his interest in the south half of said lot No. 4679, and remained liable for his interest in the remainder of the property, the amount to be estimated by a valuation (*ventilation*) of the south half of the lot proportionately to the price of the whole property. *Reeves v. Perrault*, 10 S. C. R. 617.

#### IDENTITY.

Identification of pledged stock. See *Carnegie v. Federal Bank of Canada*, 8 O. R. 75.

Proof of identity of chattel. See *The Stevens, Turner & Burns Foundry and General Manufacturing Co. (Limited) v. Barfoot*, 9 O. R. 692.

#### ILLEGAL DETENTION.

See *CONVERSION*.

#### ILLEGITIMATE CHILD.

See *BASTARD*.

#### IMPOUNDING ANIMALS.

Replevin will not lie against a pound-keeper. In this case the sheep which were impounded were grazing upon an open common with the consent of the owner thereof, and were being herded by a boy in charge of them with a view to driving them home, when they were taken possession of by two constables, against the boy's remonstrance:—Held, that the sheep were not "running at large," in contravention of a by-law of the municipality on the subject, and that the constables were liable in replevin for impounding them; but that replevin would not lie against the pound-keeper:—Held, also, that

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the constables were not entitled to notice of action.—Per O'Connor, J.—because, although they were public officers, it was no part of their duty as such officers to distrain and impound the sheep, even if they were "running at large" contrary to the by-law; they were merely "other" persons, who under the by-law were empowered to take and deliver to the pound-keeper. Per Wilson, C. J.—Unless some facts existed which might give rise to an honest belief that the sheep were at large, and unless they honestly believed that such a state of things existed, they were not entitled to notice of action, but such a state of facts did not exist under the evidence in this case. *Ibbottson v. Henry*, 8 O. R. 625—Q. B. D.

See *Graham v. Spettigue et al.*, 12 A. R. 261, p. 197. See also *Re Milloy and the Municipal Council of the Township of Onondaga*, 6 O. R. 573.

### IMPRISONMENT.

#### I. ARREST.

1. *Generally*—See ARREST.
2. *Malicious Arrest*—See MALICIOUS ARREST, PROSECUTION AND OTHER PROCEEDINGS.

#### II. ATTACHMENT—See ATTACHMENT OF THE PERSON.

#### III. UNDER JUDGMENT SUMMONS—See DIVISION COURTS.

#### IV. CA SA—See CAPIAS AD SATISFACIENDUM.

#### V. UNDER CONVICTIONS—See INTOXICATING LIQUORS—JUSTICES OF THE PEACE.

#### VI. HABEAS CORPUS—See HABEAS CORPUS.

### IMPROVEMENTS ON LAND.

#### I. UNDER MISTAKE OF TITLE, 317.

#### II. COVENANTS IN LEASES—See LANDLORD AND TENANT.

#### III. USE OF IMPROVEMENTS ON STREAMS—See WATER AND WATER COURSES.

#### I. UNDER MISTAKE OF TITLE.

No occupation rent should be charged against one who has been in occupation of land under mistake of title, in respect of the increased value thereof arising from improvements which are not allowed him. *McGregor v. McGregor*, 5 O. R. 617.—Ferguson.

Improvements made under a mistake of title are not, since R. S. O. c. 95, s. 4, to be allowed for as liberally as improvements made by a mortgagee in possession. The enhanced value of a farm, improved under a mistake of title, is found by deducting from the present value of the land, with the improvements, the estimated present value of the land without the improvements, plus any increase in value from other causes than such improvements. The occupation rent chargeable to a person improving land under a mistake of title is the rental value of the land without the

improvements. *Munsie v. Lindsay*, 16 P. R. 173. *Hodgins, Master in Ordinary*. But see S. C. infra.

In fixing an occupation rent to be charged against one who had been occupying land under mistake of title, and at the same time an allowance to be made to him for improvements, if such occupation rent is charged on the full increased value (as it should be in such case), then interest should be allowed on the actual costs of proper outlay for lasting improvements as an offset. Manner of taking the account and contra account in such cases pointed out. *S. C.*, 11 O. R. 520.—Boyd.

In this action it was referred to the master to take an account of the rents and profits received by one who had occupied land under mistake of title, viz.: as assignee of a devisee the devise to whom was void, and to fix an occupation rent to be paid by him, and also to fix the sum to be allowed to him in respect to improvements, and to certain legacies charged by the will on the said land and which he had discharged, and also of payments made by him on account of taxes, and it appearing that in discharge of some of the said legacies less than the face value thereof had been paid:—Held, that in computing interest on the sums so paid in respect of the legacies, it should only be computed on the amounts actually paid, and not on the face value of the legacies, and further that the account should be taken together so that on one side would appear the disbursements for improvements, legacies, and taxes, and on the other the occupation rent. *Id.*

See *Shanagan v. Shanagan*, 7 O. R. 203, p. 213.

### IMPROVIDENCE.

See FRAUD AND MISREPRESENTATION.

### INCOME.

ASSESSMENT OF.—See ASSESSMENT AND TAXES.

### INCREASING STOCK.

See CORPORATIONS.

### INDEMNITY.

See GUARANTEE AND INDEMNITY.

### INDIAN LANDS.

Application to quash by-law regulating animals running at large in municipalities in which are situate Indian lands. See *In re Milloy and The Municipal Council of the Township of Onondaga*, 6 O. R. 573.—Rose.

Held, that the defendant, who was a Visiting Superintendent and Commissioner of Indian affairs for the Brant and Haldimand Reserve, had jurisdiction under the statutes relating to Indian affairs to act as a justice of the peace in the matter of a charge against the plaintiff for unlawfully trespassing upon and removing cor-

wood from the Indian Reserve in the county of Brant. *Hunter v. Gilkison*, 7 O. R. 735—Q. B. D.

The prisoner was indicted for larceny under the Indian Act of 1880, 43 Vict. c. 28, s. 66 (Dom.) and was convicted:—Held, (Wilson, C. J., dissenting), that he ought not to have been convicted, because, per Armour, J., the wood, the subject of the alleged larceny, was not in the absence of satisfactory information, supported by affidavit, "seized and detained as subject to forfeiture" under the Act; and because, per O'Connor, J., the affidavit required by sec. 64, had not been made, and was a condition precedent to a seizure. Per Wilson, C. J.—Sec. 64 cannot apply to trees found by the officer of the department in the act of being removed from the lot on which they have been wrongfully cut, or where there can be no doubt they have been unlawfully cut, for such an application would make it impossible to effect a seizure in such case. *Regina v. Fearman*, 10 O. R. 660.—Q. B. D.

Held, affirming the judgment of Boyd, C., 10 O. R. 196, that lands ungranted upon which Indians have been accustomed to roam and live in their primitive state, form part of the public lands, and are under the B. N. A. Act now held in the same manner by that Province in which such lands are situate as before the confederation of the several Provinces. *Regina v. The St. Catharines Milling and Lumber Co.*, 13 A. R. 148.

#### INDIANS.

I. HALF BREED'S RIGHTS—See HALF BREED'S RIGHTS.

II. INDIAN LANDS—See INDIAN LANDS.

III. SALE OF LIQUOR TO—See INTOXICATING LIQUORS.

As to right of electors on Indian lands to vote upon petition for Canada Temperance Act, 1878. See *Regina v. Shavelear*, 11 O. R. 727.

On an application which was granted under Rule 80, for judgment against an Indian living with his tribe on their reserve, and not being the holder of any real or personal property outside the reserve:—Held, that since the repeal of C. S. C. c. 9, there is nothing to prevent an Indian suing and being sued, although by the Indian Act of 1880, sec. 77 (Dom.) the judgment will not bind any property of the Indian except that described in sec. 75. *Bryce, McMurrich & Co. v. Salt*, 11 P. R. 112.—Dalton, Master.

#### INDICTMENT.

See CRIMINAL LAW.

As to whether indictment or mandamus is the appropriate remedy to compel a municipality to repair an existing bridge or erect a new one. See *In re the Corporations of the Townships of Moulton and Canborough and the Corporation of the County of Haldimand*, 11 A. R. 503.

#### INFANT.

##### I. POWERS OF.

1. To Devise, 320.
2. To Act as Executor, 320.

##### II. CUSTODY OF, 321.

##### III. GUARDIANS AND TRUSTEES, 321.

##### IV. INFANT'S ESTATE.

1. Maintenance, 321.
2. Sale of, 322.
3. Other Cases, 322.

##### V. ACTIONS AND PROCEEDINGS BY AND AGAINST.

1. Suing as Executor, 322.
2. Next Friend, 322.
3. Costs of Official Guardian, 323.

##### VI. MISCELLANEOUS CASES, 323.

##### VII. ILLEGITIMATE CHILD—See BASTARD.

##### VIII. SEDUCTION OF—See SEDUCTION.

##### I. POWERS OF.

1. To Devise.

In a so-called will, executed a few days before her death, G., L.'s wife, assumed to devise the land in question to L. At the date of this will G. was only eighteen years of age.—Held, that the will was invalid. *J. S. U. C. c. 73, s. 16* (R. S. O. c. 106, s. 6), *only* removes the disability of coverture in respect to wills, not of infancy. *Re Murray Canal—Lawson v. Powers*, 6 O. R. 685.—Boyd.

2. To Act as Executor.

The 6th sec. of 38 Geo. III. c. 87 (Imperial), prohibiting the grant of probate to infants under the age of 21 is in force in Ontario, either as a rule of decision in matters relating to executors and administrators (R. S. O. c. 40, ss. 34 and 35) or as a rule of practice in the Probate Court in England (R. S. O. c. 46, s. 32). *Merchants Bank v. Monteith*, 10 P. R. 334.—Hodgins, Master in Ordinary.

An infant cannot lawfully be appointed administrator of an estate; and therefore a grant of probate or of letters of administration to an infant is void, and confers no office on, and vests no estate in such infant. *Id.*

An infant had been appointed administrator of an estate, and various suits had been brought in his name on behalf of such estate:—Held, that being an infant he was incapable of bringing suits in his own name, or of making himself or the estate he assumed to represent liable for the costs of such suits. *Id.*

The 57th and 58th sections of the Surrogate Act (R. S. O. ch. 46), protects parties bona fide making payments to an executor or administrator notwithstanding any invalidity in the probate or letters of administration, but they do not protect payments made to third parties by an infant assuming to act as administrator of the estate. *Id.*

An infant's tort is not *Purvis*, 11 O.

A return by infants, in which the infants are the defendants, is not valid. *Id.*

An order by the court, s. 12 (Ont.) to receive in the name of a person as trustee in doubt, is not valid. *Id.*

A foreigner under 47 Vic. c. 12, s. 12 (Ont.) is not entitled to receive in the name of a person as trustee in doubt. *Id.*

An application for payment of a father, who was a Surrogate, is not valid. *Id.*

Payment of a father, who was a Surrogate, is not valid. *Id.*

Where a father, who was a Surrogate, is not valid. *Id.*

Where an infant is not valid. *Id.*

An infant whether executor or executor de son tort is not liable for a devastavit. *Young v. Purvis*, 11 O. R. 597.—Proudfoot.

## II. CUSTODY OF.

A return was made by the mother of the infants, in whose custody they were, to a writ of habeas corpus obtained by the father with the object of compelling the delivery of their custody to him. The return stated that they were all under twelve, the age mentioned in R. S. O. ch. 130, sec. 1:—Held, upon demurrer, that the return must be considered in the light, not only of the common law, but of the statutory provisions with regard to the custody of infants, and that the return was sufficient in law. *Re Murdock*, 9 P. R. 132, explained and followed. *Re Smart Infants*, 11 P. R. 482.—Ferguson.

## III. GUARDIANS AND TRUSTEES.

An order having been made under 47 Vic. c. 20, s. 12 (Ont.), for the appointment of a trustee to receive insurance moneys to which infants were entitled, the Master in Ordinary named a person as trustee, and required him to give security in double the amount to be received. On an ex parte appeal the direction of the master that security should be given was affirmed, and —Held, that it would be contrary to the uniform practice of the court to appoint any one as the custodian of infants' money, whether as trustee or guardian, without requiring security for the proper discharge of his duties. *Re Thin*, 10 P. R. 490.—Hodgins, *Master in Ordinary*.—Boyd.

A foreigner was appointed trustee for infants under 47 Vic. c. 20, (Ont.) to receive insurance moneys, without being required to give security in this province, on its being shewn that he had given security upon his appointment as guardian, to the satisfaction of a court in the state where he and the infants resided. The insurance company were discharged upon payment to the trustee of the moneys in their hands. *Re Andrews*, 11 P. R. 199.—Ferguson.

An application for an order sanctioning the payment of a bequest in favour of infants to their father, who with the infants resided in a foreign state, and had there been appointed guardian by a Surrogate Court, was refused, and the executors were ordered to pay the amount of the bequest into court. *Re Andrews*, 11 P. R. 199, distinguished. *Re Parr*, 11 P. R. 301.—Boyd.

Payment of infants' legacy to guardian. See *Huggins et al. v. Law et al.*, 11 O. R. 565.

## IV. INFANTS' ESTATE.

### 1. Maintenance.

Where a father whose children are maintained by another, and who could have obtained possession of their persons by habeas corpus, allows them to be so maintained, he is liable for their support and maintenance, to the person in whose care such children are. *Hughes v. Rees*, 10 P. R. 301.—Hodgins, *Master in Ordinary*.

Where an allowance for past maintenance of infants is sought out of the infants' estate, it is a

rule that the principal is not to be encroached upon, unless for unavoidable reasons falling little short of necessity; and the court will not sanction a higher allowance for past expenditure than would have been awarded for maintenance if a prior application had been made therefor. *Cram v. Craig*, 11 P. R. 236.—Boyd.

Where the aggregate amount of principal of the estate of five infants was \$11,250, the master allowed their mother \$9,504 for five years' past maintenance, but Boyd, C., on appeal, reduced the amount to \$6,600. *Ib.*

### 2. Sale of.

Certain infants' lands were sold under an order which appeared upon its face to have been presented under the statutable jurisdiction of the Court of Chancery relating to the sale of infants' estates: 12 Vic. c. 72, R. S. O. c. 40, s. 76. The petition and order were entitled in the matter of the infants, and the subsequent proceedings were taken as provided by the general orders of the court, the order setting out that what was being done was because it was beneficial to the infants, and the conveyance was executed by the referee for the infants. A subsequent purchaser objected that the order for sale did not disclose any jurisdiction:—Held, that as the court would never allow the infants to recede from what was so done for their benefit, a subsequent purchaser could not raise doubts as to jurisdiction, when upon the face of the proceedings the statute authorizing the sale appeared to have been followed. *Calvert v. Godfrey*, 6 Beav. 97, considered and distinguished. *Blean v. Blean*, 10 O. R. 693.—Boyd.

### 3. Other Cases.

A sum of money left by McD. in his will to his daughter, who predeceased him, was paid into court by McD.'s executors. The daughter by her will had disposed of the moneys which she expected from her father's estate, leaving part to her husband and part to her infant children, naming her husband executor, and directing him to invest the infants' shares and expend the interest for their maintenance. It was admitted by the official guardian on behalf of the infants that there was no reason to anticipate danger to the money if paid out to the executor:—Held, that the will of the testatrix should be respected, and the infants' money paid out to the executor. *Re McDougall Trusts*, 11 P. R. 494.—Ferguson.

See also *Powell v. Cahler et al.*, 8 O. R. 505, p. 289.

See also Subhead III., p. 321.

## V. ACTIONS AND PROCEEDINGS BY AND AGAINST.

### 1. Suing as Executor.

See *Merchants Bank v. Monteith*, 10 P. R. 334, p. 320.

### 2. Next Friend.

Where one commenced an action as next friend to an infant to restrain waste on the infant's pro-

party without any notice to the defendant, and without any investigation as to the good reasons which the defendant had for acting in the manner complained of:—Held, that the next friend should pay the costs. *Mill v. Mill*, 8 O. R. 370.—Boyd.

An order was made indemnifying the next friend of the infant plaintiffs out of their money for the costs of an appeal to the Supreme Court of Canada, where the appeal was advised by more than one counsel, and one of the judges of the Court of Appeal had dissented from this rest. *Cottingham et al. v. Cottingham*, 11 P. R. 13.—Ferguson.

See *Garrett v. Roberts*, 10 A. R. 650, *infra*.

### 3. Costs of Official Guardian.

The official guardian's costs of defending this action on behalf of an infant defendant were ordered to be paid by the plaintiff, notwithstanding that judgment was pronounced in favour of the plaintiff against the infant defendant, and that the latter had been found to be a party to the fraud which occasioned the action. *Westgate v. Westgate et al.*, 11 P. R. 62.—Ferguson.

### VI. MISCELLANEOUS CASES.

Quere, whether an order made by the referee of titles barring the claims of an infant heir at law would have the effect of divesting the estate of the infant. *Re Shaver*, 6 O. R. 312.—Boyd.

An infant cannot form one of the five persons requisite to incorporate a road company under R. S. O. c. 152. See *Hamilton and Flamborough Road Company v. Townsend*, 13 A. R. 534.

See *McPherson v. McPherson*, 10 P. R. 140, p. 251.

### INFORMATION.

BEFORE MAGISTRATES—See INTOXICATING LIQUORS—JUSTICES OF THE PEACE.

In Extradition. See *In re H. L. Lee*, 5 O. R. 583, p. 268.

### INFORMER.

Held, that 18 Eliz. c. 5, which enacts that an informer shall sue either in person or by attorney, is in force in this province; and, therefore, the plaintiff, an infant suing by his next friend, could not maintain an action for a penalty under the Election Act. The appellant having omitted to take this objection in the court below, this court on allowing the appeal on that ground refused him his costs of appeal. *Garrett v. Roberts*, 10 A. R. 650.

A person who sues for a penalty given by the Election Act is a common informer. *Id.*

### INJUNCTION.

I. TO RESTRAIN LEGAL PROCEEDINGS, 324.

II. TO RESTRAIN NUISANCES, 325.

III. TO RESTRAIN TRESPASS, 325.

IV. TO RESTRAIN INTERFERENCE WITH EASEMENTS, 326.

V. TO RESTRAIN BREACH OF COPYRIGHT—See COPYRIGHT.

VI. TO RESTRAIN BREACH OF PATENTS—See PATENTS FOR INVENTION.

VII. TO RESTRAIN USE OF TRADE MARKS—See TRADE MARKS.

VIII. TO RESTRAIN WASTE—See WASTE.

IX. TO MUNICIPAL CORPORATIONS, 326.

X. PARTIES APPLYING.

1. *Wife*, 328.

XI. APPEALS, 328.

XII. COSTS, 328.

XIII. BREACH OF INJUNCTION, 328.

### I. TO RESTRAIN LEGAL PROCEEDINGS.

The trustees of M., deceased, who held the legal estate in land in trust for sale for the purpose of a reservoir, sold to one Z., in 1854, a portion of lot ten, Niagara Falls Survey, for the purpose of a reservoir, the intention being to run a line of pipes over the residue of said lot to Niagara Falls, where a pump house was to be constructed for the purpose of forcing the water to the reservoir, and thence it was to be distributed by pipes over the town of Niagara Falls. T. B., as well as E. B. M., the acting trustee, agreed to extend this lease for ever at a rental to be fixed every twenty-one years. The trustees subsequently sold the land in question to S. B., son of T. B., whose place, it was understood, S. B. was to take. T. B. having the right of purchase under his lease, and having expended large sums in improving the property. S. B. subsequently mortgaged to a certain company who sold under foreclosure proceedings to the plaintiff. The land through which such pipes were to run had been devised by one M. to E. B. M., his wife and three others as trustees. In 1854 E. B. M. alone leased it to T. B. for fourteen years. In 1854 T. B. leased a strip 8 feet wide by 650 feet long to Z., for the purpose of laying his pipes therein, for ten years, at a nominal rent, and both T. B. and E. B. M., in the year, by separate instruments, covenanted with S. B. that she or T. B., if he should purchase the land under a provision in his lease for the purpose, would continue the lease to Z. for twenty-one years, perpetually renewable, at a rent to be fixed by arbitration. Z. constructed the reservoir, &c., and laid down the pipes in 1854, and the town had been supplied by them ever since. In 1864 E. B. M. gave a further lease to T. B. for seven years, and in 1868 she conveyed to S. B. the appointee of T. B., his father. S. B. mortgaged to a loan company who sold under a decree for sale to the plaintiff, stating in the advertisement that it was subject to the right of the defendants, who represented Z., to lay their water pipes under the lease from

T. B. to Z. no further 1 year was, b and S. B., n plaintiff, wh size defend against then y E. B. M. trustees und agreed to it, case from T. (nued as ag 1864. 3. th covenants of sion and con permanent a public benefi time of the p nes having l they were ex tion, and t wable at a y the regist S. O. R.

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PROCEEDINGS.

1, who held the sale for the purchase of Z., in 1854, Survey, for the tion being to make of said lot to house was to be forcing the water was to be distr of Niagara Falls acting trustee ever at a rental ears. The trust l in question to ce, it was under having the right having expended property. S. B. refused. In re Lake Superior Native Copper Company (Limited), 9 O. R. 277.—Proudfoot.

## II. TO RESTRAIN NUISANCES.

C., the owner of two lots of land divided in one place by G.'s land, and in another by a bay formed by the waters of the Rideau Canal, which washed the shores of all these lots, began to construct a bridge between his two lots for easier access between them, which bridge would have the effect of cutting off G.'s land from the canal, and of making the water between the bridge and G.'s land stagnant:—Held, that upon the evidence G. was entitled to an injunction against C. to compel him to desist from the work, and remove that part already constructed. *Gardiner v. Chapman*, 6 O. R. 272.—Ferguson.

See also Sub-head IX., p. 326.

## III. TO RESTRAIN TRESPASS.

In 1883 M. W. being seised of certain lands, conveyed half thereof to G. W. in fee, describing the same by metes and bounds, and afterwards

died having devised the other half to M. There was a house on the lands in question so situate that half of it was on the portion granted to G. W., and half on the portion devised to M. No specific mention of the house was made either in the deed to G. W. or in the will. M. now commenced, in defiance of G. W.'s protests, to pull down the half of the house situate on the land devised to her, and G. W. applied in the present action for an injunction to restrain the same. Held, that he was entitled to the relief claimed. *Wray v. Morrison et al.*, 9 O. R. 180.—Ferguson.

See *Bell Telephone Co. v. Belleville Electric Light Co.*, 12 O. R. 571, *infra*.

## IV. TO RESTRAIN INTERFERENCE WITH EASEMENTS.

An interlocutory injunction having been granted to restrain defendants, who were carrying on business in partnership as an Electric Light Company under license from a municipal corporation, from running their lines in such a way as to interfere with the safe and efficient working of the business of the plaintiffs, an incorporated Telephone Company, also licensees of the corporation, under authority granted two years previously to the defendants' license:—Held, that, although the circumstance that the plaintiffs were in possession of the ground, and had their poles erected about two years before the defendants put up their poles, did not give them the exclusive possession or right to use the sides of the road on which they had placed their poles, yet, their possession being earlier than that of the defendants, the defendants had not the right to do any act interfering with or to the injury of the plaintiffs' rights. Held, also, that independently of the provisions of R. S. O. ch. 157, secs. 59 and 70, as extended to Electric Light Companies, 45 Vict. ch. 19, sec. 3 (Ont.), the plaintiffs were entitled to relief on the general ground upon which protection and relief in cases of this kind are granted. Quære, whether defendants were liable to indictment. *Bell Telephone Co. v. Belleville Electric Light Co.*, 12 O. R. 571.—Wilson.

See *Gardiner v. Chapman*, 6 O. R. 272, p. 325.

## IX. TO MUNICIPAL CORPORATIONS.

The defendants constructed a number of drains in their town, discharging into a creek running through the lands of the plaintiff, which drains conducted a quantity of brine or salt and refuse from salt manufactories in the neighbourhood into the creek, and rendered the water filthy and unfit for drinking, and also corroded the machinery in the plaintiff's woollen factory. And the defendants, having passed a by-law, to deepen the said creek, threw down the plaintiff's fences, entered upon his land, and threw up earth from the bed of the creek and left it there:—Held, (affirming the decision of Proudfoot, J.,) that the drains not being constructed under a by-law, the plaintiff was entitled to maintain an action for his injury sustained, and for an injunction, and was not compelled to sue those who had discharged the offensive matter into the drains, nor to seek his remedy under the arbitration clauses

of the Municipal Act, nor to resort to mandamus to compel better drainage. *Van Egnoud v. The Corporation of the Town of Seaforth*, 6 O. R. 599.—Chy. D.

When M. brought action for an injunction against a municipal corporation for that by reason of certain drainage work constructed by them the defendants had caused an increased quantity of water to flow into a creek running through his lands which were situate in an adjoining township, and which had consequently been flooded and damaged, partly from the access of water sent into the creek, and partly from the increased velocity imparted to the flow of water into the creek:—Held, that M. was entitled to an injunction restraining the increased flow of water into the creek, and also the increased velocity, and to a reference as to damages, and that he was not bound to proceed by way of arbitration under 46 Vict. c. 18, (Ont.) ss. 590, 591, but was at liberty to seek relief in the ordinary way by action:—Held, also, that the fact that the by-law under which the said drainage work was done had not been quashed, did not prevent the plaintiff from bringing this action. *Malot v. The Corporation of the Township of Mersea*, 9 O. R. 611—Chy. D.

In pursuance of the powers conferred by ss. 551 and 553 of the Municipal Institutions Act, R. S. O. c. 174, the council of the defendant municipality passed a by-law authorizing the paving of F. street with cedar blocks, which work was proceeded with, but executed in such a manner as to cause water to flow over and rest upon the lands of the plaintiff:—Held, affirming the judgment of Proudfoot, J., who found that the work had been negligently performed, that the plaintiff was entitled to recover the amount of damages sustained by her, and to enjoin the defendants from further overflowing her land; and that in consequence of such negligence her proper remedy was by action; not by a proceeding under the statute for compensation. *McGarvey v. The Corporation of the Town of Strathroy*, 10 A. R. 631.

On a motion for injunction by W. a ratepayer, against a town corporation, to restrain them from paying for a site for a post-office, it was shewn that a vote of the ratepayers had been taken as to which of two sites (one owned by the town and the other by one McA.) should be chosen, that W. had taken an active part in support of the one owned by the corporation, and the majority of ratepayers had voted for the other. It was contended that W. was estopped by his conduct from maintaining the suit, and that McA. and the individual members of the corporation should have been made parties. W. having denied that he was aware that the site chosen was to be paid for by defendants, and no sufficient proof of that fact having been given:—Held, that he was not estopped, and for the purpose of the motion, that although McA. and the members of the corporation might not, if joined, have been considered improper parties, still they were not necessary parties, and the injunction was granted. *Wallace v. The Corporation of the Town of Orangeville*, 5 O. R. 37.—Ferguson.

Held, that under 45 Vict. c. 29, s. 12 (Ont.), the corporation of one municipality cannot erect or establish a small-pox hospital within the limits

of another, either of a temporary or a permanent character, without the sanction of the corporation of the latter, and an injunction was granted to restrain the same. *The Corporation of the Township of Elizabethtown v. The Corporation of the Town of Brockville et al.*, 10 O. R. 372.—Boyd.

Exempting manufacturing establishments from taxation. See *Scott v. The Corporation of Tilbury*, 13 A. R. 233.

See *Canadian Land and Emigration Co. v. Municipality of Dysart*, 12 A. R. 80, p. 21.

## X. PARTIES APPLYING.

### I. Wife.

The plaintiff, a married woman, carried on business as an hotel-keeper, and owned the chattels in the hotel. The defendant, her husband, interfered with the plaintiff in her business by taking the receipts, giving orders to servants, and maltreating the plaintiff. An injunction was granted restraining the defendant from interfering in the business or with the servants or agents, or removing any of the plaintiff's chattels:—Sensible, that, if asked for, an injunction might also have been granted excluding the defendant from the hotel under the circumstances. *Donnelly v. Donnelly*, 9 O. R. 673.—Rose.

## XI. APPEALS.

Where an injunction is ordered at the hearing of a cause, and the parties enjoined give the security required by R. S. O. c. 38, s. 26, pending an appeal to the Court of Appeal, all proceedings to enforce the injunction are, by virtue of sec. 2 of that Act, thereupon stayed; and a writ of sequestration cannot therefore be obtained, pending the appeal, on the ground of non-compliance with the injunction. *Dundas v. Hamilton and Milton Road Co.*, 19 Chy. 455, followed, and referred to *McLaren v. Caldwell*, 29 Chy. 438. *McGarvey v. The Corporation of the Town of Strathroy*, 6 O. R. 138.—Proudfoot.

## XII. COSTS.

Security for costs was ordered in an action brought by a ratepayer for himself and the other ratepayers to restrain the delivery by the corporation of certain debentures to a railway company where it appeared from the examination of the plaintiff that he was financially incompetent to pay the defendants' costs, and was only interested to an insignificant extent; and where he swore that he expected certain persons named to pay his costs and to protect him should the case go adversely, that he did not want to spend any money on the prosecution of his own right in the matter, and that he did not know who instructed the plaintiff's solicitor. *Clark v. St. Catharines*, 10 P. R. 205.—Dalton, Master.

See *Donnelly v. Donnelly*, 9 O. R. 673, p. 32.

## XIII. BREACH OF INJUNCTION.

On a motion to commit a defendant for non-compliance with a decree which contained the

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clause: "And this court doth further order and decree that an injunction be awarded to the plaintiff perpetually restraining the defendant, his servants, workmen, and agents from trespassing upon the lands of the plaintiff in the buildings mentioned," the trespass complained of being two walls built by the defendant on four inches of the plaintiff's land, it was ordered: 1. That the suit was revived while pending in the Court of Appeal by an order issued from the Division of the High Court of Justice appealed from. 2. That no certificate of the Supreme Court (which had in substance affirmed the decree) had been served; and 3. That the notice of motion did not specify the acts of disobedience. It was:—Held, that the suit was properly revived: that it was not necessary to serve the certificate of the Supreme Court when the decree was not materially altered, and when the defendant well knew that the decree would be enforced; and that when (as in this case) a correspondence had shewn the defendant that acts were complained of, it was not necessary to repeat them in the notice of motion, and the objections were overruled:—Held, also, that under the form of the decree, the plaintiff was entitled to have the walls removed, and if the defendant did not remove them within a month the order must go. *Grasett v. Carter*, 6 O. R. 84—Boyd.

The defendant was committed for breach of the injunction, but was discharged on an application explaining and apologizing for his contempt. It appeared that he was unable to pay costs, and therefore, though costs of both motions were imposed, payment thereof was not made a condition of such discharge. *Donnelly v. Donnelly*, 9 O. R. 673—Osler.

See *McGarvey v. The Corporation of the Town of Strathroy*, 6 O. R. 138. p. 328.

### INNKEEPER.

The plaintiff had been for some time a guest of the defendant, an innkeeper, and on leaving the inn, after paying his bill, was allowed to leave a box containing some papers and books alleged to be of value to the plaintiff, in the room of the inn used for storing luggage, &c. The plaintiff intended to take it away the day following, but owing to illness he did not call for it for several weeks afterwards, when it was discovered that the box was lost; there was no other evidence of any negligence in the matter:—Held, reversing the judgment of the County Court, that the plaintiff could not recover. *Palin v. Reid*, 10 O. R. 63.

See *Newcombe v. Anderson et al.*, 11 O. R. 665, p. 61.

### INSOLVENCY.

See *BANKRUPTCY AND INSOLVENCY.*

### INSPECTION ACT.

See *Verratt v. McAulay*, 5 O. R. 313.

### INSPECTION OF DOCUMENTS.

See *EVIDENCE.*

### INSURANCE.

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#### II. FIRE INSURANCE.

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  - (b) *Damage by Removal of Goods*, 332.
4. *Conditions and Representations*.
  - (a) *Description of Premises*, 332.
  - (b) *Title and Incumbrances*, 333.
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#### III. MARINE INSURANCE.

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5. *Abandonment and Loss*, 341.
6. *Double Insurance and Contribution*, 343.

#### IV. LIFE ASSURANCE.

1. *Payment of Premium and Delivery of Policy*, 343.
2. *Evidence of Misstatements and Suppression of Facts by Insured*, 344.
3. *For Benefit of Wife and Children*, 345.

#### V. ADMINISTRATION OF INSURANCE COMPANIES' DEPOSIT, 346.

#### VI. WINDING-UP COMPANIES—See CORPORATIONS.

#### I. GENERALLY.

A company incorporated by a Provincial Legislature for the business of insurance, possesses the same capacity and franchises within the jurisdiction creating it as a company incorporated by the Imperial or Dominion Parliaments; and may enter into contracts outside the province wherever such contracts are recognized by comity or otherwise. *Clarke v. Union Fire Ins. Co.*, 10 P. R. 313.—Hodgins, *Master in Ordinary*. See *S. C.*, 6 O. R. 223.

Taxation by municipality of premiums of foreign Insurance Company. See *The Phoenix Ins. Co. of London et al. v. The Corporation of the City of Kingston et al.*, 7 O. R. 343.

Appointment of trustee to receive insurance moneys for infant—Security. See *Re Thin*, 10 P. R. 490.

Examination of local agent for purpose of discovery. See *Goring v. The London Mutual Fire Ins. Co.*, 10 P. R. 642.

## II. FIRE INSURANCE.

### 1. Generally.

The Fire Insurance Policy Act, R. S. O. c. 162, does not apply to property outside of Ontario. *Cameron et al. v. The Canada Fire and Marine Ins. Co.*, 6 O. R. 392.—Osler.

Held, that the measure of damages recoverable by tenant for life of the insured premises is the full value of such premises to the extent of the sum insured. *Caldwell v. Stadacona Fire and Life Ins. Co.*, 11 S. C. R. 212.

See *Goring v. The London Mutual Fire Ins. Co.*, 11 O. R. 82, p. 337.

### 2. Insurable Interest.

J., the manager of appellant's firm, insured the stock of one S., a debtor to the firm, in the name and for the benefit of the appellant. At the time of effecting such insurance J. represented appellant to be mortgagee of the stock of S. S. became insolvent and J. was appointed creditors' assignee, and the property of the insolvent was conveyed to him by the official assignee. On 8th March, 1876, S. made a bill of sale of his stock to J., having effected a composition with his creditors under the Insolvent Act of 1875, but not having had the same confirmed by the court. The insurance policy was renewed on 5th August, 1876, one year after its issue. On 12th January, 1877, the bill of sale to J. was discharged and a new bill of sale given by S. to the appellant, who claimed that the former had been taken by J. as his agent, and the execution of the latter was merely carrying out the original intention of the parties. The stock was destroyed by fire on 8th March, 1877. An action having been brought on the policy it was tried before Smith, J., without a jury, and a verdict was given for the plaintiff. The Supreme Court of Nova Scotia set aside this verdict and ordered a new trial on the ground that plaintiff had no insurable interest in the property when insurance was effected, and that no interest subsequently acquired would entitle him to maintain the action. One of the conditions of the policy was, "that all insurances, whether original or renewed, shall be considered as made under the original representation, in so far as it may not be varied by a new representation in writing, which in all cases it shall be incumbent on the party insured to make when the risk has been changed, either within itself or by the surrounding or adjacent buildings." On appeal to the Supreme Court of Canada:—Held, 1. That the appeal should be heard. *Eureka Woollen Mills Co. v. Moss*, 11 S. C. R. 91, distinguished. 2. That the appellant having had no insurable interest when the insurance was effected, the subsequently acquired interest gave him no claim to the benefit of the policy, the renewal of the existing policy being merely a continuance of the original contract. *Howard v. Lancashire Ins. Co.*, 11 S. C. R. 92.

Held, (reversing the judgment of the court below) *Fournier, J.*, diss., that C. had an insurable interest in the property in question in this case at the time of the loss as husband of the owner in fee and tenant by the curtesy initiate, and having had also an insurable interest when the insurance was effected, the policy was not avoided by a deed given by C. to B., who had reconveyed to C.'s wife. *Caldwell v. Stadacona Fire and Life Ins. Co.*, 11 S. C. R. 212.

### 3. Risks Insured.

#### (a) Explosion.

Where the damage complained of in action upon fire policies, which were subject to the statutory conditions, was caused by an explosion of gunpowder accidentally set fire to, and by the fire subsequently resulting from the explosion:—Held, (affirming the decision of the C. P. Div., 7 O. R. 634, and of the Q. B. Div., 8 O. R. 343) that, upon the construction of the 11th statutory condition, the defendants were not liable except for the damages caused by the after fire. *Hobbs et al. v. Guardian Ins. Co.*, *Hobbs et al. v. Northern Ins. Co.*, 11 A. R. 741.

See *Mitchell v. City of London Fire Ins. Co. (Limited)*, 12 O. R. 706, p. 341.

#### (b) Damage by Removal of Goods.

See *McLaren v. The Commercial Union Assurance Co.*, 12 A. R. 279, p. 336.

### 4. Conditions and Representations.

#### (a) Description of Premises.

The plaintiff, in his application for insurance, described the building insured by an illegible word that was intended by him for board, but was read by the defendants as brick, and they issued their policy upon a brick building and at a premium rate for that class of building, and were not aware until after the fire, that the building was a board one. Condition 17 of the statutory conditions on the policy provided:—"The loss shall not be payable until thirty days after the completion of the proofs of loss, unless otherwise provided by statute or the agreement of the parties"; and there was a condition printed upon the policy, in the manner required by the Fire Insurance Policy Act as a variation of conditions, that "The loss shall not be payable until sixty days after the completion of the claim." Action was commenced upon the policy more than thirty days but less than sixty days after the fire. After action the defendants demanded a magistrate's certificate under statutory condition 16, and had an arbitration under statutory condition 16, and by the award on the arbitration it was found that the value of the building insured was \$2,500, and the amount of the loss was \$1,700. The jury found that the value of the building was \$3,500, and the amount of the loss was \$3,500:—Held, per Wilson, C. J., that by reason of a misunderstanding as to the nature of the building, the parties never contracted together, but the defendants waived their right to object to the mistake by demanding the magistrate's certificate and the arbitration, and by doing so precluded themselves from asserting that no contract was ever made. (2) That the

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(3) That the condition that the loss should not be payable until sixty days after completion of the claim, being in the policy and not dissented from by the plaintiff, constituted an agreement between the parties, and that it was a reasonable condition; but that it was unreasonable for the company to insist upon it, as they never intended to pay the loss. *Per Armour, J.*—Following *Parsons v. Queen's Ins. Co.*, 2 O. R. 45, any variation of the statutory condition—*prima facie*, unjust and unreasonable. *Smith v. City of London Ins. Co.*, 11 O. R. 38.—Q. B. D. Affirmed by Court of Appeal, 23 C. L. J. 235.

#### (b) Title and Incumbrances.

The plaintiff effected an insurance on buildings and the chattels therein, specific amounts being placed on each. By the application in answer to questions to that effect, the plaintiff stated that the premises were held in fee simple and were unencumbered; and at the end thereof there was a provision that where property was heavily encumbered, or the value of buildings as compared with the amount insured on ordinary contents was small, the manager, &c, was authorized to insert the two-third's clause. The application was made part of the policy, which contained the statement that the premises were represented in the application as being held in fee simple and unencumbered. It was also so stated in the proofs of loss. By the first statutory condition, if the insured misrepresented or omitted to communicate any circumstance material to be made known to the company to enable them to judge of the risk, the insurance should be of no force as respects the property misrepresented, &c. The property herein had been conveyed to the plaintiff by his father in consideration of natural love and affection, but subject to a charge to support the father and a brother and to other charges, and on default the plaintiff was to stand seised to the use of the father of the land, which should immediately revert in him as before:—Held, that under the first statutory condition, in order to cause the misrepresentation as to the property to avoid the policy, it must be material, which was a question for the jury to decide; and that the misrepresentation only applied to the buildings, and not to the chattels:—Held, also, that the fifteenth statutory condition which provides that "all fraud or false swearing in relation to any of the above particulars, shall vitiate the claim," did not apply to the statements as to title or incumbrances, for it referred to the particulars contained in the thirteenth statutory condition, items (d) to (e) which had no relation whatever to such statements. The learned judge at the trial having entered a verdict for the defendants, on the ground that the misrepresentation itself avoided the policy, a new trial was directed. *Goring v. The London Mutual Fire Ins. Co.*, 10 O. R. 236.—C. P. D.

See *S. C.*, 11 O. R. 82, p. 337.

#### (c) Notice and Proof of Loss.

By the policy it was provided that the loss or damage should be "estimated according to the actual value of the property insured, that is,

what it could have been actually sold for in cash at the time of loss;" and the condition on the policy required that the affidavit of loss should state the actual cash value of the property. In the printed proofs of loss, which were used, the words, "actual cash value" were struck out, and a statement substituted giving the cost of the property in 1880, a year previous to the insurance being effected:—Held, that this was not a compliance with the policy and condition:—Held, therefore, there could be no recovery on the policy. *Cameron et al. v. The Canada Fire and Marine Ins. Co.*, 6 O. R. 392.—Osler.

One of the conditions of a policy of insurance against fire on ice and packing, contained in an ice house situated in the state of Wisconsin, provided that the proofs of loss should be delivered "as soon after the loss as possible." The fire occurred on the 17th September, 1881, and the proofs of loss were not delivered until the middle of May, 1882, when they were objected to and returned to the insured, who re-delivered them in the same state in the month of July following. The only reason given for not delivering them sooner was, that it was not convenient to do so:—Held, that the condition was not complied with. *Ib.*

By the 13th statutory condition, "Any person entitled to make a claim under a policy is \* \* \* to deliver \* \* \* as particular account of the loss as the nature of the case permits," and is also to furnish therewith a statutory declaration declaring: (1) that the said account is just and true; and by the 15th condition: "Any fraud or false statement in a statutory declaration in relation to any of the above particulars shall vitiate the claim." The plaintiff by a policy of insurance against fire effected an insurance on buildings and contents, by separate amounts being placed on each, the amount on contents being \$200. In the proofs of loss, to induce the defendants to pay the loss, the plaintiff falsely and fraudulently stated in the statutory declaration furnished by her, that she had suffered loss on the contents to the amount of \$1,665.50, whereas the contents were proved to be worth only \$150:—Held, that the misstatement vitiated the whole claim, and not merely the claim in respect to the particular property as to which it was made. *Harris v. The Waterloo Mutual Fire Insurance Co.*, 10 O. R. 718.—C. P. D.

A. effected insurance on C.'s property, on which he held a mortgage, under authority from and in the name of C., with loss payable to himself. During the continuance of the policy the company notified A. that the insurance would be terminated, and advised him to insure elsewhere. Such notice also stated that unearned premiums would be returned, but no payment or tender of same was made according to conditions of policy. A took policy to agent of insurers, who was also agent of the W. Ins. Co., and left it with him, directing him to put risk in latter company. No receipt was given, and property was destroyed by fire immediately after. Company resisted payment on the ground that policy was surrendered, and contended on the trial, in addition, that C. had parted with his interest in the property by giving a deed to one B. who had reconveyed to C.'s wife, and the proper proofs of loss had not been given, claiming in reply to a plea of waiver in regard to such proofs, that such

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*Refining Co. v. Ace Co.*, 12 A. R.

See *Clarke v. The Union Fire Ins. Co.—Claim of the Agricultural Fire Ins. Co. of Watertown*, New York, 6 O. R. 640, p. 347.

### 11. Re-Insurance.

See *Clarke v. The Union Fire Ins. Co.—McCree's Claim*, 6 O. R. 635, p. 347.

### 12. Surrender of Policy.

See *Caldwell v. Stadacona Fire and Life Ins. Co.*, 11 S. C. R. 212, p. 335.

### 13. Mutual Insurance Companies.

Held, that an assessment for the purpose of paying promissory notes given by a Mutual Insurance Company must be confined to the premium notes or undertakings current at the time the loss occurred in respect of or to meet which the company's notes were given. New members cannot be assessed to pay notes given previously to their joining the company. *The Victoria Mutual Fire Ins. Co. of Canada v. Thomson*, 9 A. R. 620.

The directors of the plaintiff company assessed the defendant, a policy holder, for several sums, some of which was illegal, and they sent one notice to him, claiming the amount of all the assessments, including the illegal one, in one sum:—Held, that the plaintiffs were not entitled to recover any of the assessments. *Ib.*

The defendant, a mutual insurance company, was incorporated by an Act of the Dominion Parliament, 41 Vict. ch. 40, by sec. 28 of which it is provided that "any fraudulent misrepresentation contained in the application therefor, or any false statement respecting the title or the ownership of the applicant or his circumstances, or the concealment of any incumbrance on the insured property, or the failure to notify the company of any change in the title or ownership of the insured property, and to obtain the written consent of the company thereto shall render the policy void."—Held, on demurrer, that the matters provided for by the above section were subject matters of the "Fire Insurance Policy Act" of Ontario, over which the province has exclusive jurisdiction; and although they might be proper subjects of legal contract, they would have no force or vitality through the Dominion Act *per se*, but only by being used as required or modified by said Ontario Act, namely in the manner provided for variations to the conditions therein contained. *Citizens Ins. Co. v. Parsons and Queen's Ins. Co. v. Parsons*, 7 App. Cas. 96, commented upon. *Goring v. The London Mutual Fire Ins. Co.*, 11 O. R. 82.—O'Connor.

The 28th section of the Mutual Fire Insurance Companies' Act, 1881, makes the Fire Insurance Policy Act applicable thereto, "except where the provisions of the Act respecting Mutual Fire Insurance Companies are expressly inconsistent with, or supplementary and in addition to the provisions of the said Fire Insurance Policy Act."—Held, this includes all mutual insurance companies doing business in the Province; and it was not alleged in the pleadings herein, that there was anything in the defendants' Act "expressly inconsistent with" the Fire Insurance

Policy Act, but merely that the matters were variations of the statutory conditions. Held, also, that the questions so far as raised, were not of a constitutional character so as to require notice to the Attorney General of the Province, and the Minister of Justice of the Dominion. *Ib.*

### III. MARINE INSURANCE.

#### 1. Insurable Interest.

See *Merchants Marine Insurance Co. v. Rumsey*, 9 S. C. R. 577, p. 339; *Anchor Marine Insurance Co. v. Keith*, 9 S. C. R. 483, p. 342.

#### 2. Warranty of Safety.

See *Anchor Marine Insurance Co. v. Keith*, 9 S. C. R. 483, p. 342.

#### 3. Goods Insured.

The respondents (plaintiffs), by an arrangement with M., who had chartered the schooner Mabel Claire for a trading voyage from Nova Scotia to Labrador and back, were to furnish the greater part of the cargo, and were to have complete control of all the goods put on board the vessel until it should return, when the return cargo was to be disposed of by the plaintiffs, who were to pay themselves for their advance, and pay over any balance remaining to S. and others. In trading on the voyage S. and others were not to dispose of any goods on credit, but were to bring back such goods as they could not dispose of, so as to obtain a return cargo in lieu thereof. The plaintiffs put on board the vessel at Halifax merchandise to an amount exceeding \$6,000, and after having done so, and upon the day on which the vessel sailed from Halifax, effected with the appellants (defendants), the policy sued upon, and an extract from which is as follows:—"Rumsey, Johnson & Co. have this day effected an insurance to the extent of \$6,000 on the undermentioned property, from Halifax to Labrador, and back to Halifax on trading voyage. Time not to exceed four (4) months, shipped in good order and well conditioned on board the schooner Mabel Claire, whereof Mouzar is master, this present voyage. Loss, if any, payable to Rumsey, Johnson & Co. Said insurance to be subject to all the forms, conditions, provisions and exceptions contained in the policies of the company, copies of which are printed on the back hereof. Description of goods insured, merchandise under deck, amount \$2,000, rate 5 per cent., premium \$100 to return two (2) per cent., if risk ends 1st October, and no loss claimed; additional insurance of \$5,000, warranted free from capture, seizure and detention, the consequences of any attempt thereat." Against the respondents' right to recover, it was contended that they were merely unpaid vendors and had no insurable interest, and that goods previously put on board at Liverpool, N.S., were not covered by this policy, and that it was not to cover the return cargo:—Held, (affirming the judgment of the court below, discharging a rule nisi to set aside a verdict for the plaintiffs), that the policy covered not only goods put on board at Halifax, but all the merchandise under deck shipped in good order on board said vessel during the period mentioned in the policy.

—Held, also, that there was sufficient evidence to shew that the plaintiffs had an insurable interest in all the goods obtained and loaded on the vessel. *Merchants Marine Insurance Co. v. Ramsey*, 9 S. C. R. 577.

#### 4. Conditions.

Where, by a certificate of marine insurance, effected in this Province on cattle, representing and taking the place of a policy, it was provided, as the condition of payment, that all claims should be reported to the M. Insurance Company of Liverpool, as soon as the goods were landed or the loss known, to be adjusted according to usages there, and the special condition of the contract of insurance:—Held, that the adjustment by the M. Insurance Company was not a condition precedent to the plaintiffs' right to recover. All that was required to be done by the insured was duly to report to that company the claim to be adjusted. *The Bank of British North America v. The Western Assurance Co.*, 7 O. R. 166.—Pronounced.

W. et al. effected in A. M. Ins. Co. a policy of insurance on a ship. The policy, among other clauses, contained the following: "In case the premium, or the note or other obligation given for the premium, or any part thereof, should be not paid when due, this insurance shall be void at and from such default; but the full amount of premium shall be considered as earned, and shall be payable, and the insurer shall be entitled to recover for loss or damage which may have occurred before such default. Should the person or any of the persons liable to the company for the premium, or on any note or obligation given therefor, or any part thereof, fail in business or become bankrupt or insolvent before the time for payment has arrived, this insurance shall at once become and be void, unless and until before loss the premium be paid or satisfactorily secured to the company." There was also in the policy an arbitration clause, by which arbitrators were to decide any difference which might arise between the company and the insured "as to the loss or damage or any other matter relating to the insurance," in accordance with the terms and conditions of the policy and the laws of Canada; and the obtaining of the decision of the arbitrators was to be a condition precedent to the maintaining of an action by the insured against the company. W. et al. gave a promissory note for the premium which was not yet due when they became insolvent; and C., the respondent, was appointed assignee. A guarantee was then given and accepted by the company as a satisfactory security for the premium. The note became due on the 30th September, 1878, and was not paid but remained overdue and unpaid at the date of the loss, on the 12th of October, 1878. After the loss, the matters in dispute arising out of the policy were submitted to three arbitrators, who awarded \$5,769.29. An action was then brought on the policy, the declaration containing a count on the award:—Held, (affirming the judgment of the court below) 1. That the premium having, on the insolvency of the insured, been satisfactorily guaranteed to the company, the policy was thereby kept in full force and effect, and did not become void on non-payment of the premium note at maturity. (Strong, J., dissenting.) 2. That

the award was binding on the company, the question as to the payment or default in payment of the premium being a difference "relating to the insurance" within the meaning of the policy, and the award not appearing on its face to be based from any mistake of law or otherwise. *Ancho Marine Ins. Co. v. Corbett*, 9 S. C. R. 73.

In an action on a voyage policy containing this clause, "warranted not to enter or attempt to enter or to use the Gulf of St. Lawrence prior to the 10th day of May, nor after the 30th day of October (a line drawn from Cape North to Cap Ray and across the Strait of Canso to the northern entrance thereof shall be considered the boundary of the Gulf of St. Lawrence)," the evidence was as follows:—The captain says: "The voyage was from Liverpool to Quebec, and ship sailed on 2nd April. Nothing happened until we met with ice to the southward of Newfoundland. Shortened sail, and dodged about for a few days trying to work our way around it. One night ship was hoisted to under lower main top-sail, and about midnight she drifted into a large field of ice. There was a heavy sea on at the time, and the ship sustained damage. We were in this ice three or four hours. Laid to all the next day. Could not get further along on account of the ice. In about twenty-four hours we started to work up towards Quebec." The log-book shewed that the ship got into this ice on the 7th of May, and an expert examined at the trial swore that from the entries in the log-book of the 6th, 7th, 8th, and 9th of May, the captain was attempting to enter the Gulf of St. Lawrence. A verdict was taken for the plaintiffs by consent, with leave for the defendants to move to enter a nonsuit, or for a new trial, the court to have power to mould the verdict, and also to draw inferences of fact the same as a jury. The Supreme Court of New Brunswick sustained the verdict. On appeal to the Supreme Court of Canada:—Held, (reversing the judgment of the court below, Henry, J., dissenting) that the above clause was applicable to a voyage policy, and that there was evidence to go to the jury that the captain was attempting to enter the gulf contrary to such clause. *Taylor v. Moran*, 11 S. C. R. 347.

G. insured a tug when navigating the river Sydenham, St. Clair, Detroit, and Thames and Lake St. Clair, loss, if any, payable to M., as his interest might appear. M. at the time of insurance and down to the happening of the loss was mortgagee. The tug was libelled in the American Admiralty Court, and to avoid the claim thereon G. used the proceedings therein upon a claim for wages to have a fraudulent sale thereof made to J. Afterwards G. procured a renewal of the policy without disclosing the sale, of which however defendants were subsequently notified. G., with defendants' assent, assigned the policy to M., but before that assent was put in writing the tug was burned in the Chenail Ecarti, one of the channels of the St. Clair. At the time of the fire crude petroleum and earth oil were kept on the tug for lubricating purposes. M. and J. delivered proof papers of claim, which were objected to. G. did not deliver any. At the trial leave was given to add G. and J. as co-plaintiffs, and judgment was directed to be entered for the plaintiffs for the full amount of the insurance:—Held (1), that the action was properly constituted in the plaintiff's name alone,

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but that if not the joinder of G. and J. as co-plaintiffs was proper. (2) That the sale, although not a sale by operation of law, and fraudulent, was a sale in fact, and was on being assented to by defendants binding on them. (3) That the tug was at the time of the fire at one of the localities permitted by the policy. (4) That the crude and earth oils, being kept for lubricating purposes, could not be said to be "stored or kept," and that clause f of the 10th statutory condition did not apply. (Wilson, C. J., dissenting.) (5) That the proofs of loss furnished were a sufficient compliance with the statutory conditions. (Wilson, C. J., dissenting.) Per Wilson, C. J.—The proofs of loss were not sufficient, but the refusal of the defendants to recognize the plaintiff M. in any way, and their retention of the policy were an answer to the imperfect compliance with the condition requiring full particulars of the loss to be stated; but the defendants were not liable by reason of the crude and earth oils being kept on the tug. Per Armour, J.—The sale of the tug was by operation of law. Per O'Connor, J.—A tug is not a "building" within the meaning of clause f of the 10th statutory condition. *Mitchell v. The City of London Fire Ins. Co. (limited)*, 12 O. R. 706.—Q. B. D.

#### 5. Abandonment and Loss.

C. as assignee of W., was insured upon the schooner *Janie R.*, to the amount of \$2,000 by a voyage policy. On the 14th February, 1879, the *Janie R.*, which had been in the harbor of Shelburne since the 7th of February, left with a cargo of potatoes to pursue the voyage described in the policy, but was forced by stress of weather to put back to Shelburne, and on the morning of the 15th she went ashore, when the tide was about its height. On the 17th notice of abandonment was given to the defendants (appellants) and not accepted, and on the 18th the master, after survey, sold her. The next day the purchaser, without much difficulty, with the assistance of an American vessel that was in the harbor, and by the use of casks for floating her (appliances which the master did not avail himself of), got her off. There was no evidence whatever of the vessel having been so wrecked as to have been worthless to repair, or to have been so much damaged that she would not have been worth, after having been repaired, more than the money expended for that purpose. The vessel afterwards made several voyages, and was sold by the purchasers for \$1,560. In an action brought on the policy against the defendant company, tried before a judge without a jury, a verdict was given in favour of plaintiff for \$1,913, which verdict was sustained by the Supreme Court of Nova Scotia. On appeal to the Supreme Court of Canada:—Held, reversing the judgment of the courts below, 1. That the sale by the master was not justified in the absence of all evidence to shew any "stringent necessity" for the sale after the failure of all available means to rescue the vessel. 2. That the undisputed facts disclosed no evidence whatever of an actual total loss and did not constitute what in law could be pronounced either an absolute or a constructive total loss. Per Strong, J., that the right to abandon must be tested by the condition of the vessel at the time of action brought, and not by that which existed when notice of

abandonment was given. *Providence Washington Insurance Co. v. Corbett*, 9 S. C. R. 256.

While the barque *Charley* was at Cochin, on or about the 12th April, 1879, the master entered into a charter party for a voyage to Colombo, and thence to New York by way of Alippee. The vessel sailed on the 22nd April, 1879, and arrived at Colombo, which place she left on 13th May, and while on her way to Alippee she struck hard on a reef and was damaged and put back to Colombo. The vessel was so damaged that the master cabled to the ship's husband at New York on the 23rd May, and in reply received orders to exhaust all available means and do the best he could for all concerned. The repairs needed were extensive and it was impossible to get them done there, and Bombay, 1,000 miles distant, was the nearest port. After proper surveys and cargo discharged, on the 10th June the vessel was stripped and the master sold the materials in lots at auction. On the 21st May the respondent, a mortgagee of  $\frac{1}{8}$  in the vessel, which he had assigned to the bank of Nova Scotia by endorsement on the mortgage, as a collateral security for a pre-existing debt to the bank of Nova Scotia, being aware of the charter from Cochin to New York, insured his interest with the appellant company, the nature of the risk being thus described in the policy: "Upon the body, &c., of the good ship or vessel called the barque *Charley* beginning the adventure (the said vessel being warranted by the insured to be then in safety), at and from Cochin via Colombo and Alippee to New York." To an action on the policy for a total loss—the defendants pleaded inter alia; 1st—that the plaintiff was not interested; 2nd, that the ship was not lost by the perils insured against; 3rd, concealment. A consent verdict for \$3,206 for plaintiff was taken, subject to the opinion of the court upon points reserved to be stated in a rule nisi, and upon the understanding and agreement that everything which could be settled by a jury should, upon the evidence given, be presumed to be found for the plaintiff:—Held, 1st. That this was a voyage policy, and that the warranty of safety referred entirely to the commencement of the voyage and not to the time of the insurance. 2nd. That the fact of the plaintiff having assigned his interest as a collateral security to a creditor did not divest him of all interest so as to disentitle him to recover. 3rd. That the vessel in this case being so injured that she could not be taken to a port at which the necessary repairs could be executed, the mortgagee was entitled to recover for an actual total loss, and no notice of abandonment was necessary. Per Strong, J., that a mortgagee, upon giving due notice of abandonment is not precluded from recovering for a constructive total loss. *Anchor Marine Insurance Co. v. Keith*, 9 S. C. R. 483.

On a voyage from Porto Rico to New Haven respondents' vessel sustained damage and put into St. Thomas. A survey was held by competent persons named by the British consul, and according to their report the cost of putting her in good condition would exceed her value. The captain, under instructions from owners to proceed under best advice, advertised and sold vessel, and purchaser had her repaired at a cost much less than the report, and sent her to sea:—Held, that there was no evidence to justify the

jury in finding that the vessel was a total loss. *Milville Mutual Marine and Fire Ins. Co. v. Driscoll*, 11 S. C. R. 183.

Owners of the vessel gave notice to agent of underwriters that they would abandon, which agent refused to accept. Owners telegraphed to captain that they had abandoned and for him to proceed under the best advice:—Held, that this act of telegraphing the captain did not constitute a waiver of the notice of abandonment. *Ib.*

#### 6. Double Insurance and Contribution..

Defendants insured for the consignor cattle from Boston to London, England, against all risks, except to be free of particular average, unless the vessel be stranded, sunk, or burned, or in collision. The cattle were consigned to F., and the consignor drew for £1,740 upon F., who accepted the bill and insured the cattle in England for £5,000, 75 per cent., against all risks, and 25 per cent mortality was not insured against. It was sworn that F. had been told by the consignor to insure in all cases where they had made advances. After the loss F. received £1,500 on account of the English policies, but hearing that an insurance had been effected in Canada, and assuming that it would have the anti-contribution clause, so that the first insurance alone would be liable, they returned the money pursuant to an undertaking which they had given, but the policies were not cancelled:—Held, that there was a double insurance, for the risk, the interest and the subject were the same, and the difference between the several policies as to the extent of liability did not vary the risk. *Bank of B. N. A. v. Western Ass. Co.*, 7 O. R. 166.—Proudfoot.

Held, also, that the defendants were liable to the plaintiffs for the whole amount insured, leaving them to recover contribution from the other insurers, according to the rule in force in England and here; but that they were entitled to deduct the £1,500 paid, and that this sum having been repaid under a mistake of fact and without prejudice, the plaintiffs might have recourse to the underwriters for it. *Ib.*

#### IV. LIFE ASSURANCE.

##### 1. Payment of Premium and Delivery of Policy.

On an action on a policy, the appellant company claimed that the policy was never delivered, and that the premium had never been paid, and that it was not a perfected contract between the parties. The policy was sent from Toronto to the agent at Halifax, to receive the premium and countersign the policy and deliver it to the party entitled. The agent never countersigned the policy, and on one side of the policy the following memo. was printed: "This policy is not valid unless countersigned by — agent at —, countersigned this — day of —"

Agent." The agent, in his evidence, said he delivered the policy to W. O'D. (the party assuring) not countersigned in order that he might read the conditions, and swore the premium had not been paid. The policy was found among W. O'D.'s papers after his death, not countersigned. The policy was dated 1st October, 1872, and the first premium would have

covered up the year up to the 1st October, 1873. W. O'D. died the 10th July, 1873. The case was tried before McDonald, J., without a jury, and he gave judgment in favour of respondent for the £3,000, and this judgment was confirmed by the Supreme Court of Nova Scotia. On appeal to the Supreme Court of Canada, it was held: (Fournier and Henry, JJ., dissenting) that the evidence established the fact that the policy had not been delivered to the assured as a completed instrument, and therefore company was not liable. Per Gwynne, J., that the instrument was delivered as an escrow to the agent, not to be delivered as a binding policy to W. O'D. until the premium should be paid and until the agent should in testimony thereof countersign the policy, and that there was no sufficient evidence to divest the instrument of its original character of an escrow, and to hold the defendants bound by the instrument as one completely executed and delivered as their deed. *Confederation Life Association of Canada v. O'Donnell*, 10 S. C. R. 92.

##### 2. Evidence of Misstatements and Suppression of Facts by Insured.

At the end of questions in an application for insurance, made in December, 1883, and forming part of the application, was an agreement signed by insured stating that he warranted and guaranteed that the answers to the said questions were true to the best of his knowledge and belief, and he also agreed that the application should be the basis of his contract, and that any misstatement or suppression of facts in the answers to said questions, or in his answers to the medical examiner, should render the policy null and void. The proposals and declaration were also made the basis of the contract. Endorsed on said application were answers given to questions by a medical examiner, and at the end thereof a certificate, signed by insured, stating that he had made full, true, and complete answers to the questions propounded by said examiner, and agreed to accept the policy on the terms mentioned in the application. In answer to a question whether he had had any serious illness, local disease, or personal injury, and if so of what nature, insured answered, "No, except a broken leg in childhood." There was an answer to a question giving one T.'s name as that of his usual medical attendant, and in answer to another question, whether he had consulted any other medical man, and if so for what and when, insured replied "Dr. A., for a cold." Insured had been thrown from a load of hay, and on his examination, in a suit for damages against the municipality, he swore he had been five weeks in bed suffering from his chest and was at that time unfit for work of any kind, and had been attended by three doctors. No mention was made of this accident or of the doctors. In reply to a question whether his grand-parents, &c., brothers, &c., ever had pulmonary or other constitutional disease, he replied, "No;" and he also stated, in reply to questions as to what disease his brother had died from, that he had died from over-growth. It was shewn that an elder brother had been treated by Dr. A., some years before, for pulmonary affection, and that insured had said that the brother who died had bled at the lungs and had been ill for some months before he died. Insured, also, in answer to a question whether any

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material fact bearing on his physical condition or family history had been omitted, replied "No." Defendants admitted policy, proofs of death, probate, &c., and accepted burden of proof at the trial, and claimed the right to begin, which was refused. On motion in term, copies of letters and documents, signed by the insured, sent to the government for leave to remain off a homestead in the Northwest, and shewing that he had been suffering from congestion of the lungs and illness, from the spring of 1883 to the spring of 1884, were produced. It was shewn that the existence of some such documents had been suspected and that they had been searched for in all the government offices but could not be found, and that defendants received them the day after the trial:—Held, that the plaintiffs had the right to begin, notwithstanding such admissions. Wilson, C. J., reserved the consideration of the admission of the new evidence. Per Armour, J.—It could not be received, as it was merely corroborative, and its suspected existence would have been ground for asking to have the trial postponed. Per Wilson, C. J.—There should be a new trial. There was evidence to go to the jury as to the truth of answer given respecting the health of the deceased brother. The jury should have been asked to say whether the answer as to inquiries was a misrepresentation in fact: that the certificate meant the answers were given upon a knowledge of the facts and upon insured's belief in the truth of those facts; and a statement made without knowledge would not be protected by the formula, "best of knowledge and belief," if insured had no knowledge; nor would such statements be protected if made regardless of the insured's belief in the truth of such knowledge as he had. The proposal was a warranty that the answers were true according to the best of his knowledge. Per Armour, J., the direction to the jury, whether insured had stated to the best of his knowledge and belief the truth in regard to deceased's brother was sufficient. As to the accident, it was one which ought to have been mentioned, but it was probably considered of too little importance by insured, or else had escaped his memory at the time of the application, and it was sufficient for the jury to have found insured did not wilfully withhold the facts, but answered to the best of his knowledge and belief; and the proposals were not warranties. The court being equally divided the motion for a new trial was dismissed, with costs. *Miller v. Confederation Life Assurance Company*, 11 O. R. 120—Q. B. D. Affirmed 14 A. R. 218.

### 3. For benefit of Wife and Children.

In 1868 M. effected a policy on his life for the benefit of his daughter, who intermarried with the plaintiff, and predeceased her father, having bequeathed her interest in such policy to the plaintiff (her executor) in trust for her only child. M.'s wife died, and in 1877, prior to the marriage of his daughter, he married the defendant. In 1884 M. died intestate, leaving the defendant, his widow and one child surviving, without making any other disposition of his life policy. In an action instituted by the plaintiff against the defendant, the widow and administratrix of M., it was—Held, (affirming the judgment of Ferguson J., 10 O. R. 283,) that the

insurance money formed part of the personal estate of M., and as such was payable to the defendant. *Wicksteed v. Munro*, 13 A. R. 486.

The statute 47 Vict. c. 20 (Ont.), does not apply to benevolent societies incorporated under R. S. O. c. 167. *Re O'Heron*, 11 P. R. 422.—Proudfoot.

A testator insured his life for the benefit of his wife and children. The policy provided that the money should be payable as might be directed by will. The testator by will appointed executors, and gave his wife the income of his estate for life and after her death the corpus to his son. The executors renounced probate, and after revocation of a prior grant to the son, who was then a minor, administration was granted to the defendant P. The policy provided that the money might be payable to the executors or administrators. The Act, 47 Vict. c. 20 (Ont.), provides that such policy moneys to which infants are entitled shall be payable to a "trustee, executor, or guardian." P. claimed the moneys as administrator, whereupon the insurance company under section 15 of the Act, and G. O. 197, and Rule 541 (a) O. J. Act, applied to the Master in Ordinary in Chambers for leave to pay the money into court. The master held (1) that voluntary applications to pay in money may be made in Chambers. (2) That under Rule 541 (a) O. J. Act, he had jurisdiction, by virtue of the administration proceedings before him, to make the order. (3) That by the renunciation of the executors there was no "trustee, executor, or guardian competent to receive the share of the infant." (4) That the Act excluded the administrator from any claim to the fund, and his receipt would not be within the protection of the statute. (5) That the administrator was not a trustee by the will, except as holding surplus assets, after administration with notice of trust. (6) That the money was no part of the estate subject to the control of creditors, and when paid in should be "ear marked," and not mixed with the other funds of the estate. On appeal by the administrator, P., Proudfoot, J., made an order directing that the money in court be paid out to the insurance company. *Merchants Bank v. Monteith; Ex parte Standard Life Assurance Co.*, 10 P. R. 588.

### V. ADMINISTRATION OF INSURANCE COMPANYS' DEPOSIT.

J. M. and F. M., his wife, were jointly insured in the defendant's company, whose deposit was being administered under R. S. O. c. 160, secs. 21, 22. On February 4th, J. M., without the assent of F. M., signed and sent to the receiver a claim for rebate as empowered under that Act. No acknowledgment of the receipt of this claim was given by the receiver, who, on February 27th, sent J. M. and the other policy holder a circular notifying them of an agreement for re-insurance, and that if they objected thereto, and desired to claim for rebate, they were to do so before March 15th. On February 24th the property was burnt, and J. M. forthwith claimed for the whole loss:—Held, that neither J. M. nor F. M. were bound by the former's claim for rebate. That it was not a release, but an invalid attempt by one to exercise a joint statutory power; or else an attempt to make a new con-

tract, which was not authorized by one of the parties, and was not accepted by the receiver before the loss occurred. Granting that a release by one joint tenant would extinguish the right of both, it does not follow that entering into a new agreement by one will prejudice the right of the other. *Clarke v. The Union Fire Ins. Co.—McPhee's Claim*, 6 O. R. 635.—Proudfoot.

Pending administration of the deposit of the U. Insurance Company under R. S. O. c. 160, secs. 21, 22, and after the completion of the receiver's schedule prescribed by the Act, a reinsurance was effected with the A. Insurance company of all the U. company's risks, in consideration of which the U. company gave the A. company its note. This note not being paid at maturity, the A. company sought to be placed on the dividend sheet of the U. company for dividends accrued or to accrue.—Held, that it was entitled to the relief asked, for properly viewed the subject of the claim existed before the schedule, though in a different shape, since by the arrangement with the A. company, made with the assent of persons entitled to rebates, the liability of the U. company in respect to rebates was greatly reduced, and to that extent the A. company should be taken to be subrogated to the position of the policy holders of the U. company. *Clarke v. The Union Fire Ins. Co.—Claim of the Agricultural Fire Ins. Co. of Watertown, New York*, 6 O. R. 640.—Proudfoot.

Canadian policy holders petitioned for distribution of the deposit made by the above company, a foreign corporation, with the Minister of finance under 31 Vict. c. 45 (Dom.) and 34 Vict. c. 9 (Dom.), the company being insolvent.—Held, that they were entitled to the relief asked, notwithstanding that proceedings to wind up the company were pending before the English Courts. The above Acts are not ultra vires of the Dominion Parliament. For any balance of their claims not covered by the deposit, Canadian policy holders would be entitled to rank upon the general assets of the company. *Re Briton Medical and General Life Ass. (Limited)* [2].—12 O. R. 441.—Proudfoot.

The definition of "Canadian policy" and "policies in Canada" in 34 Vict. c. 9, s. 1 (Dom.) is not to be interpreted to mean that the deposit is only for the security of policy holders whose policies were issued after the deposit was made and license to transact business in Canada obtained. *Id.*

## INTEREST ON MONEY.

### I. WHEN ALLOWED.

1. *Generally*, 348.
2. *From what Time*, 348.
3. *At what Rate*, 349.
4. *Liability of Executors and Administrators*—See EXECUTORS AND ADMINISTRATORS.
5. *On Bills or Notes*—See BILLS OF EXCHANGE AND PROMISSORY NOTES.
6. *On Judgments*—See JUDGMENT.
7. *On Mortgages*—See MORTGAGE.

### I. WHEN ALLOWED.

#### 1. Generally.

In a foreclosure suit a decree was made in November, 1877, and a final order of foreclosure obtained in June, 1878. In October, 1882, a petition was presented by the defendants to open the foreclosure, which was dismissed, 2 O. R. 348. The Court of Appeal reversed this decision making an order to open the foreclosure on the usual terms of paying principal, interest and costs, including the plaintiffs' costs of opposing the petition, 10 A. R. 99.—Held, affirming the decision of the Master in Ordinary, that the plaintiffs were entitled to interest on the whole amount of principal, interest, and costs as found by the decree of November, 1877.—Held, also, reversing the decision of the Master in Ordinary, that the plaintiffs were not entitled to interest on the taxed costs of opposing the petition to open the foreclosure, for these costs were not recoverable by force of the order made on the petition, which was reversed, but simply owing to the direction of the Court of Appeal. *Trinity College v. Hill et al.*, 8 O. R. 286.—Boyd.

Interest as damages. See *Minnie v. Leitch*, 8 O. R. 397.

Interest on arrears of annuity. See *Snarr et al. v. Badenuch*, 10 O. R. 113.

It is not usual to allow interest on claims where there is no fraud, or wilful withholding of accounts, only a loose mode of dealing between the parties. The discretion under which a jury may allow interest applies to the master's office. *Re Kirkpatrick—Kirkpatrick v. S. Benson*, 10 P. K. 4.—Hodgins, *Master in Ordinary*.

In fixing an occupation rent to be charged against one who had been occupying land under mistake of title, and at the same time an allowance to be made to him for improvements, if such occupation rent is charged on the full increased value (as it should be in such case) then interest should be allowed on the actual cost of proper outlay for lasting improvements as an offset. *Munsie v. Lindsay et al.*, 11 O. R. 520.—Boyd.

In this action it was referred to the master to take an account of the rents and profits received by one who had occupied land under mistake of title, viz., as assignee of a devisee the devise to whom was void, and to fix an occupation rent to be paid by him, and also to fix the sum to be allowed to him in respect to improvements, and to certain legacies charged by the will on the said land and which he had discharged, and also of payments made by him on account of taxes, and it appearing that in discharge of the said legacies less than the face value had been paid.—Held, that in computing interest on the sums so paid in respect of the said legacies, it should only be computed on the amounts actually paid, and not on the face value of the legacies, and further that the account should be taken together so that on one side would appear the disbursements for improvements, legacies, and taxes, and on the other the occupation rent. *Id.*

#### 2. From what Time.

A purchaser becomes liable to pay interest, when no time is fixed by the contract, from the

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time when he could prudently take possession, and in the case of the purchase of several properties under an indivisible contract he cannot prudently take possession until the title to the whole is made. *Laird v. Paton*, 7 O. R. 137.—Pondfoot.

Where no claim for arrears of interest is specially made by the pleadings, and where there is no covenant to pay interest, only six years' arrears can be recovered. *Wiley v. Ledyard*, 10 P. R. 182—Hodgins, *Master in Ordinary*.

The "taking" of land under the Railway Acts is properly fixed as at the date of the company giving notice to the landowner of their intention of taking the land; and it is not correct to say that the value of the lands should be taken as of a date prior to knowledge of intention to construct, or in anticipation of the construction of the railway. Interest is properly allowed to the landowner on the amount of his compensation from the time of the taking as above defined to the time of the award. *James v. The Ontario and Quebec R. W. Co.*, 12 O. R. 624.—Ferguson.

### 3. At What Rate.

A note dated 11th January, 1862, payable to and endorsed by one S. H., was for \$3,000 with interest at the rate of two per cent. per month till paid. By a covenant for payment contained in a mortgage deed of the same date, given by the defendant to the plaintiff as a collateral security for the payment of this note, the defendant covenanted to pay "the said sum of \$3,000 on the 11th day of July, 1862, with interest thereon at the rate of twenty-four per cent. per annum until paid." A judgment was recovered upon the note, but not upon the covenant. The master allowed for interest in respect of this debt six per cent. only from the date of the recovery of the judgment.—Held, that the proper construction of the terms of both the note and covenant as to payment of interest was that interest at the rate of twenty-four per cent. should be paid up to the 11th July, 1862, and not that interest should be paid at that rate after such day if the principal should then remain unpaid. *St. John v. Rykert*, 10 S. C. R. 278.

Money was paid into a bank under Consolidated Railway Act, 1879 (Dom.), s. 9, subs. 28, and an order for immediate possession of lands expropriated by the company was made by a judge under the subsection, and an award of compensation was made subsequently.—Held, that the landowner was entitled to interest on the amount awarded him only at the rate allowed by the bank on the money paid in and not at the legal rate. *Re George Taylor and the Ontario and Quebec R. W. Co.*, 11 P. R. 371.—O'Connor.

An order was obtained for immediate possession of land under the Consolidated Railway Act, 1879 (Dom.), and money was paid into the Canadian Bank of Commerce under the same Act by the company.—Held, that the landowner was entitled to interest upon the amount subsequently awarded him from the date of the award, only at the rate allowed by the bank upon a deposit and not at the legal rate of six per cent. *Re Lea*, 21 C. L. J. 154, followed. *Re Philbrick and Ontario and Quebec R. W. Co.*, 11 P. R. 373.—Boyd.

## INTERIM ALIMONY.

See HUSBAND AND WIFE.

## INTERLOCUTORY JUDGMENTS.

See JUDGMENT.

## INTERNATIONAL LAW.

### I. FOREIGN DIVORCE—See HUSBAND AND WIFE.

### II. EXTRADITION—See EXTRADITION.

A., being domiciled and carrying on business in Montreal, in 1875, executed at Toronto, where he was temporarily resident, a deed entered into between B., his wife, of the first part, and himself and C. of the second part, whereby A., B. and C. covenanted that certain Ontario Bank stock, which had been bought with certain moneys received by B. after her marriage, and which were then held in the name of A. in trust for B., should be duly transferred into the names of C. and A., and that this stock, as well as a sum of \$4,000, which B. had received from her mother at the time of the marriage, and which had been put into the commercial business of A. in Montreal, should, with \$2,000, the value of some furniture received by B., be held by C. and A. in trust to invest as therein mentioned, and to permit B., during her life, to receive the income to her own use, and after her death in trust for the children of the marriage, and in default of surviving issue over. In 1877 the bank stock was transferred in Montreal in trust pursuant to the deed. The head office of the Ontario Bank is in Toronto, but they have a stock registry in Montreal for convenience.—Held that inasmuch as all the property settled appeared on the evidence to have become, and to have been "community property," and inasmuch as, although the bank stock must be held to have been at the time of the execution of the deed and of the transfer situate in Ontario, yet the deed not purporting to be a complete transfer of the property in the stock, but containing only a covenant to transfer, which was consummated afterwards, not in Ontario, but in Montreal, the case fell under the law of the owner's domicile, and applying that law, there was not a good transfer by the husband of the right of property in the stock.—Held, also, as to the money, that being at the time of the deed in Quebec, the validity of the transfer of it must depend on the law of that province, under which the transfer both as to the wife and the children was void; for even if the wife's signing the deed amounted, as contended, to an acceptance by the children, it was only the acceptance of a promise and not of a gift.—Held, on the whole case, that no property passed into the hands of the trustees by the transactions set forth. *Hughes v. Rees*, 5 O. R. 654.—Ferguson.

When the husband's domicile is in the province of Quebec, and there is no ante-nuptial settlement, the law there upon marriage makes a settlement of the property of the parties, wherever situate, including that acquired subsequently,

though the ceremony of marriage may take place out of the province. This is called "community property," and it is not in the power of the husband, during the coverture, to make a gift of it, directly or indirectly, to his wife, although he is the administrator of it, and may make gifts to the children, if the gifts are properly accepted. *Ib.*

The fact that a suit for the same matter is pending in Quebec cannot be urged as a plea in bar to a suit for the same cause in this province. *Ib.*

To an action by the administrator in Ontario of W. M., deceased, on a policy on the life of W. M., which, by the terms thereof, was payable in Montreal, in the Province of Quebec, the defendants pleaded that the policy was issued from their office in Montreal; that by its terms the moneys were payable there; that the defendants had no office in Ontario for the payment of moneys by them, and that the plaintiff had not obtained letters of administration in Quebec, and had no right or title to sue for the money:—Held, on demurrer, a good defence. *Pritchard v. Standard Life Ass. Co.*, 7 O. R. 188.—Rose.

The defendants signed and sealed a number of policies in blank, and sent them to an agent in New York to be filled up and issued as insurances were effected. A., their agent, there filled up one for a risk of \$2,500 on a lumber yard, a risk greater than extra hazardous, although he had been instructed not to take any extra hazardous risk for more than \$1,500. He issued the policy without receiving the payment of the premium, although a condition was indorsed on it that no insurance proposed to the company was to be considered in force until the premium should be paid in cash. The policy was issued on the 8th August. The fire occurred on the 10th August. A cheque for the premium was sent to the company on the 11th August, which was immediately returned and the risk repudiated. Under the winding-up proceedings of the company it was attempted to prove a claim for the loss in the Master's office, when it was contended that the law of the state of New York, where the policy was issued, governed the contract, and under that law the agent had power to waive the payment of the premium. The master disallowed the claim, 10 P. R. 313, holding that the law of Ontario governed the contract. On an appeal from the master's certificate, it was:—Held, that the master was right. That the law of Ontario governed, as the place where the policy was signed and sealed was the place where the contract was made. *Clarke v. Union Fire Ins. Co.*—*Re Export Lumber Co.*, 6 O. R. 223.—Ferguson.

A company, incorporated in the State of Michigan, while in insolvent circumstances, had given a mortgage upon chattels in Ontario to defendant, a Michigan creditor, to secure previous cash advances made to the company under verbal promises by two directors that security would be given. The effect of the mortgage was to delay and prejudice other creditors and give defendant a preference over them:—Held, that, the property mortgaged being in Ontario, the transaction was governed by the laws of Ontario without regard to the laws of Michigan. *River Stave Co. v. Sill*, 12 O. R. 557—Q. B. D.

See *The Commercial National Bank of Chicago v. Corcoran*, 6 O. R. 527, p. 53.

## INTERPLEADER.

### I. WHEN RELIEF GRANTED.

1. *To Sheriff*, 352.
2. *In Other Cases*, 354.

### II. PRACTICE.

1. *Directing the Issue*, 355.
2. *Other Cases*, 355.

### III. APPEALS, 355.

### IV. COSTS, 356.

### V. EFFECT OF JUDGMENT, 357.

### VI. LIABILITY OF SHERIFF, 357.

### VII. IN DIVISION COURTS — See DIVISION COURTS.

### I. WHEN RELIEF GRANTED.

#### 1. *To Sheriff*.

The sheriff seized the goods in question on the 31st day of January, 1883, and on the 1st of February was notified of a claim by an assignee of the judgment debtor (the assignee being an officer employed by the sheriff), and on the same day the plaintiff's solicitors directed him to sell. The sale took place on the 12th of February, and on the 13th of February the sheriff received the money arising therefrom. On the 26th of February, the sheriff informed the plaintiff's solicitors that the solicitors for the assignee forbade him to pay over the proceeds, and on the 2nd of March the plaintiff received a notice from the assignee's solicitors that they were instructed to sue him. On the 5th of March notice was given of the application for an interpleader order. The sheriff retained in his hands the proceeds of the sale, and his affidavit, filed on the interpleader application, referred to a conversation which he had had with the claimant's solicitor, in which the latter told him that the claimant did not propose to claim the goods, or interfere with their sale, but would contest the right of the plaintiff to the money arising from the sale, which was to remain in the sheriff's hands. The sheriff also swore that he related what the claimant's solicitors had said to the plaintiff's solicitor. The sheriff's excuse for his delay from the 13th of February to the 5th of March was, that he did not understand that it was his duty to take the initiative:—Held, that the sheriff sold with the consent of both parties and did not, therefore, improperly exercise his own discretion, so that the contest properly arose as to the proceeds of the sale. Held, that the delay from the 13th of February to the 5th March, no opportunity of trial being lost, was not unreasonable. Held, that the fact of the claimant being an officer in the employment of the sheriff made no difference. Per Boyd, C., The disposition of the court is to be more liberal in relieving the sheriff now than formerly. *Darling v. Collaton*, 10 P. R. 110.—Mr. Winchester, sitting for the Master in Chambers—Proudfoot—Chy. D.

The sheriff having seized goods of much greater value than the amount of plaintiffs' execution, which were claimed by a third party, received from the claimant the amount due on the execution in cash, and withdrew from the seizure:—Held, that the sheriff had not thereby disentitled

himself to re-interpleading the Master.

S. placed on the 11th December, put in a claim the 21st, and on the 24th claimed all pay any over the 25th of indemnity was not entitled the landlord —Dalton, J.

A mortgage certain irregular subsequent mortgage for value, to be mentioned in it, was afterwards but was unavailing and not confirmed in it, and defendant's claim was entitled to P. R. 378.—

Where a execution the an interpleader exercised the property defendant.

Shares of may be seized R. S. O. c. and he is one of the Interpleader of the issue of the trial of an adverse claim the *Brown v. Cameron*.

Interpleader extreme caution evidence of should ordination, by an if he has sum of the execution 11 P. R. 66.

A sheriff went to the found the execution over the without furnishing a claim to the plaintiff for a title that the defendant all his property an interpleader, and an creditor.

Seemingly, at the time should be paid



himself to relief by interpleader. *Paria Manufacturing Co. v. Walls*, 10 P. R. 138.—Dalton, Master.

S. placed an execution in the sheriff's hands on the 11th December, and A. one on the 12th December. On the 20th December the landlord put in a claim for rent. The sale took place on the 21st, and the sum of \$1,707.06 was realized. On the 24th one H. notified the sheriff that he claimed all the money in his hands, and not to pay any over to any one else. On the 27th December the sheriff paid S. in full, and took a bond of indemnity from him:—Held, that the sheriff was not entitled to an interpleader against H. and the landlord. *Adams v. Blackwell*, 10 P. R. 168.—Dalton, Master.

A mortgagee, under a mortgage which, from certain irregularities in it, was void against subsequent mortgagees or purchasers in good faith for value, took possession of the chattels mentioned in it, and secreted them. An execution was afterwards issued, and the sheriff endeavoured but was unable to seize the goods. It was alleged, and not contradicted, that the execution creditor and defendant were colluding to defeat the mortgagee's claim:—Held, that the sheriff was not entitled to an interpleader. *Ogden v. Craig*, 10 P. R. 378.—Dalton, Master—Rose.

Where a sheriff intends to take goods under an execution the court has jurisdiction to grant him an interpleader, but this jurisdiction will be rarely exercised, and never unless it is shewn that the property or possession in the goods is in the defendant. *Ib.*

Shares of the stock of an incorporated company may be seized and sold under the Execution Act, R. S. O. c. 66, by a sheriff under a fi. fa. goods, and he is entitled to an interpleader under sec. 10 of the Interpleader Act, R. S. O. c. 54, where an adverse claim to the stock is advanced. The trial of the issue was, however, stayed until after the trial of an action between the same parties attacking the conveyance from the judgment debtor. *Brown v. Nelson*, 10 P. R. 421.—Dalton, Master—Cameron.

Interpleader orders should be granted with extreme caution and only after strong presumptive evidence of the goods being the debtor's, which should ordinarily appear by his being in possession, by an affidavit of the belief of the sheriff, if he has such belief, and by a similar affidavit of the execution creditor. *Duncan et al. v. Tees*, 11 P. R. 66.—Rose.

A sheriff, instructed by the execution creditor went to the store which had been the defendant's, found the claimants in possession and their name over the door, and notwithstanding this, and without further inquiry made a seizure. Upon a claim to the goods being made, the sheriff applied for an interpleader order, swearing positively that the seizure was of goods and chattels belonging to the defendant. It was admitted that the defendant had made an assignment of all his property before the seizure:—Held, that an interpleader order should not have been granted, and an order was made barring the execution creditor. *Ib.*; *S. C.* 296.

Seemable, that if the claimant be in possession at the time of the seizure, the execution creditor should be plaintiff in the interpleader issue. *Ib.*

The order in this case was varied on appeal by the Divisional Court, by directing the parties to proceed to the trial of an issue at the next assizes, the execution creditors to be the plaintiffs and the claimants to be defendants, and the question to be tried to be, whether at the time of the seizure the goods in question were exigible under the creditors' execution, or the execution of either of them, as again, the claimants. *S. C.*, 11 P. R. 296—Q. B. D.

See *Pardee v. Glass*, 11 O. R. 275, p. 101.

## 2. In Other Cases.

The Master in Chambers made an order directing an interpleader issue to be tried between the plaintiff and certain attaching creditors as to the validity of the plaintiff's judgment and execution:—Held, that the issue directed was warranted by s. 10 of R. S. O. c. 54 (the Interpleader Act). *Leech v. Williamson*, 10 P. R. 226.—Rose.

The order provided for the trial of the question of the validity of the plaintiff's judgment as against creditors generally, and also provided that on the trial of the issue it should be open to the attaching creditors to shew that the plaintiff's judgment was void as against the attaching creditors for fraud or as being a preference:—Held, that these provisions were warranted by s. 3, R. S. O. c. 54. *Ib.*

Held, following *Leech v. Williamson*, 10 P. R. 226, that attaching creditors may be "claimants" within the meaning of the Interpleader Act. Although *Macfie v. Pearson*, 8 O. R. 745, in effect decides that the execution creditor, who has seized before process against the defendant as an absconding debtor has issued, is to be paid in priority, yet that decision having been rendered by consent in a summary way, is not binding upon the claimants in this case, who may choose to litigate upon issues which can be carried to appeal. *Standard Ins. Co. v. Hughes*, 11 P. R. 226.—Boyd.

The plaintiff, J. P., and one E. T., severally claimed from the defendants payment of the moneys due under a certain certificate of membership issued by the defendants to T. P., deceased, the plaintiff claiming as administrator pendente lite of T. P., J. P. claiming that the certificate had been indorsed to her by the deceased, and E. T. as administrator. It appeared that a duplicate certificate had issued to T. P. upon his alleging that he had lost the one originally issued. The defendants were always willing to pay any one who might be entitled, and upon this action being brought applied for an interpleader order in respect of the adverse claims. J. P. did not appear in answer to the application, and her claim was barred, and the money ordered to be paid to E. T. upon certain terms. Upon an appeal by E. T. from this order it was:—Held, that there was a right to interpleader upon a summary application, either under s. 17, sub-s. 6, O. J. Act, or under the former practice of the Court of Chancery. Rule 2, O. J. Act, does not extinguish any right to interplead that formerly existed; it regulates the practice only, and enables a defendant to obtain relief upon a summary application, where formerly it would have been necessary to file a bill:—Held, also, that the

defendants were entitled to their costs of the action and application, and to retain them out of the funds in their hands, and that the balance should be paid to E. T. instead of into court, as the other claimant had withdrawn, upon E. T. indemnifying the defendants against the production of the original certificate, and that the action should be stayed. *McEltheran v. The London Masonic Mutual Benefit Association*, 11 P. R. 181.—Proudfoot.

See *Duncan et al. v. Tees*, 11 P. R. 66, 296, p. 353. See also *Hevitt v. Heise*, 11 P. R. 47.

## II. PRACTICE.

### 1. Directing the Issue.

Upon an interpleader application by the sheriff of York there were two execution creditors, viz., the Merchants Bank of Canada and one James Walsh, and three claimants, viz., one Clarkson, the assignee of the execution debtor, for the general benefit of creditors, the Imperial Bank of Canada and the Standard Bank of Canada, both claiming under warehouse receipts. The Master in Chambers directed the trial of four issues, viz., (1) The Merchants Bank and Clarkson, plaintiffs, against the Imperial Bank, defendants; (2) The Standard Bank, plaintiffs, against the Merchants Bank and Clarkson, defendants; (3) The Standard Bank, plaintiffs, against the Imperial Bank, defendants; (4) the Merchants Bank, plaintiffs, against James Walsh, defendant, (as to priority of execution.) Wilson, C. J., varied the order of the master by substituting for the above first three issues a single issue, viz., the Merchants Bank plaintiff v. the Imperial Bank, Standard Bank and Clarkson, defendants. *Merchants Bank v. Herson*, 10 P. R. 117.

See *Leech v. Williamson*, 10 P. R. 226, p. 354; *Standard Ins. Co. v. Hughes*, 11 P. R. 220, p. 354.

### 2. Other Cases.

An interpleader issue arising out of an action in the High Court of Justice was directed to be tried in a County Court pursuant to 44 Vict. c. 7, s. 1, (Ont.):—Held, that a motion to postpone the trial of the issue should have been made in the County Court. *London and Canadian Loan and Agency Company v. Morphy*, 11 P. R. 86.—Dalton, Master.

The gross proceeds of a sale of goods in an interpleader matter should be paid by the sheriff into Court without deducting anything for his expenses. *Ontario Bank v. Revell*, 11 P. R. 249.—Dalton, Master.

## III. APPEALS.

An interpleader issue arising out of an action in the Chancery Division of the High Court of Justice was sent to a County Court for trial by order made in chambers:—Held, that it was to be intended that the order was made under 44 Vict. c. 7 (Ont.), rather than under the interpleader jurisdiction of the old Court of Chancery; and that being so, that a Divisional Court of the High Court of Justice had no jurisdiction to hear an appeal from the judgment of the County Court

on such issue, and that such appeal should have been to the Court of Appeal under R. S. O. c. 54, s. 23. *Close v. Exchange Bank*, 11 P. R. 186—Chy. D.

A motion to quash an appeal to this court from the judgment of Ferguson, J. (9 O. R. 314), upon the trial of an interpleader issue, upon the ground that the decision was interlocutory, and not appealable under sec. 35, O. J. Act, was dismissed without costs, the members of the court being divided in opinion. Per Hagarty, C. J. O., and Osler, J. A.—The decision in question was an interlocutory order within the meaning of sec. 35, O. J. Act, and one from which there would have been no relief before the passing of the O. J. Act by a direct appeal to this court; and sec. 35 precludes such an appeal under the O. J. Act, though there is the right to have the order reheard by a Divisional Court, and an appeal lies from the order on rehearing, which is not less interlocutory than the order at the trial, because an appeal lay in such case before the O. J. Act. Per Burton and Patterson, J. J. A.—The decision is a final adjudication on the question of property, and is only interlocutory in the sense of being a step in the interpleader proceedings which, as a whole, are interlocutory with relation to the original action. But an appeal lay before the Judicature Act from the decision of an interpleader issue notwithstanding its interlocutory character. Therefore, this decision being the decision of a judge in court is appealable under sec. 37 and is not within the restriction of sec. 35. Per Carman.—Rule 510 does not give a right of appeal from the decision in question, for it is in terms limited to the trial of actions, and cannot be extended to the trial of interpleader issues. Quere, per Patterson, J. A., whether the term "interlocutory" in sec. 35 is not used in the same sense as in 45 Vict. c. 6, s. 4 (Ont.), as denoting the character of the decision, and not the stage at which it is pronounced. *McAndrew v. Barker*, 7 Chy. 701, discussed. *Whiting v. Hovey*, 12 A. R. 119.

## IV. COSTS.

Held, on the facts stated in the special case, that the plaintiff and defendants should each pay their own costs of the interpleader, and each one moiety of the costs of the railway company and of the sheriff. *McLaren v. Canada Central R. W. Co.*, 10 P. R. 328.—Dalton, Master.

On appeal by a sheriff from the order of the Master in Chambers striking out so much of a former order as awarded the sheriff his costs of appearing on a motion made by the claimant, in an interpleader for a final order barring the execution creditor for default in giving security for costs, as directed by the order granting the interpleader:—Held, that the sheriff was properly served with notice of such motion, and was entitled to his costs thereof. *Gray v. Alexander*, 10 P. R. 358.—Osler.

When a writ of fi. fa. goods is placed in a sheriff's hands, and special directions are given to him to seize particular goods, though not in contemplation of an adverse claim, if the execution creditor abandons after interpleader proceedings have been taken, he must pay the sheriff's and claimant's costs. *Vanstuden (Ex. Cre-*

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See *McEltheran v. The London Masonic Mutual Benefit Association*

See *Farrington*

V. See *McLaren v. Canada Central R. W. Co.*, 10 P. R. 330.

INTERPLEADER

See *Ex parte*

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II. SALE

III. LIEN

IV. SUBJ

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Claimant), 10 P. R. 428.—Osler.

Where the special directions were sworn to on  
one side and denied on the other, it was:—Held,  
that the sheriff must be assumed to have acted  
only under the writ, without such directions,  
and an appeal from the master's order refusing  
costs to the sheriff was dismissed, but without  
costs, as the affidavit in denial contained imper-  
tinent and scandalous matter. 10.

Sec. 10 of the interpleader Act, R. S. O., c.  
54, does not place a sheriff in a more advantage-  
ous position than an ordinary suitor, and the fact  
that a claimant is a married woman and in finan-  
cial straits, is not a ground for ordering security  
for the sheriff's costs. Sweetman v. Morrison,  
10 P. R. 446.—Boyd.

See McEltheran v. The London Masonic Mutual  
Benefit Association, 11 P. R. 181, p. 355.

#### V. EFFECT OF JUDGMENT.

See Farrow v. Tobin, 10 A. R. 69, p. 203.

#### VI. LIABILITY OF SHERIFF.

See McLean v. Anthony—Slater v. Anthony, 6  
O. R. 330.

#### INTERPRETATION OF WORDS AND TERMS.

See WORDS AND TERMS.

#### INTESTATE.

See EXECUTORS AND ADMINISTRATORS.

#### INTIMIDATION.

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#### INTOXICATING LIQUORS.

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VII. CONVICTIONS.

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#### I. LEGISLATIVE AUTHORITY.

Under the authority of the Act of the Legis-  
lature of Quebec, 42 and 43 Vict. c. 4, s. 1, a penal  
suit was, on the 20th of January, 1880, instituted  
against P. in the name of the corporation of Q.,  
before the Recorder's Court of the city of Q.,  
alleging that "on Sunday, the 18th day of Jan-  
uary, 1880, the said defendant has not closed,  
during the whole of the day, the house or build-  
ing in which he, the said defendant, sells, causes  
to be sold, or allows to be sold, spirituous liquors  
by retail, in quantity less than three half pints  
at a time, the said house or building situate, &c."  
P. was convicted. A writ of prohibition, to  
have the conviction revised by the Superior  
Court, was subsequently issued, and upon the  
merits was set aside and quashed:—Held (per  
Ritchie, C. J., and Strong and Fournier, JJ.)  
that the provisions of the Provincial Statute 42  
and 43 Vict. c. 4, ordering houses in which  
spirituous liquors, &c., are sold, to be closed on  
Sundays, and every day between eleven o'clock  
of the night until five of the clock of the morn-  
ing, are police regulations, within the power of  
the Legislature of the Province of Quebec, and  
as the complaint was clearly within the Act, the  
recorder could not be interfered with on probi-  
tion. Per Henry, Taschereau, and Gwynne,  
JJ., that the penalty imposed upon P. by the  
recorder was not authorized by the statute, even  
if such statute was intra vires of the Provincial  
Legislature, and that the prohibition was there-  
fore rightly granted. The court being equally  
divided, the appeal was dismissed without costs.  
Poulin v. The Corporation of Quebec, 9 S. C. R.  
185.

The Quebec License Act (41 Vict. c. 3), is  
intra vires of the Legislature of the Province of  
Quebec. Hodge v. The Queen, 9 App. Cas. 117  
followed. Sulte v. The Corporation of the City of  
Three Rivers, 11 S. C. R. 25.

#### II. SALE TO INDIANS.

A conviction under the Indian Act, 1880, for  
giving intoxicating liquor to an Indian imposed  
a fine and costs, and in default of immediate pay-  
ment, imprisonment:—Held, that the conviction  
was invalid and must be quashed, for while s. 90  
provides as punishment for the offence, impris-  
onment or fine, or fine and imprisonment, it does  
not authorize a fine, and in default of payment  
imprisonment; and that the defect was not re-  
medied by s. 98, which enacts, that no prosecu-  
tion, conviction, &c., under the Act shall be in-  
valid on account of want of form, so long as the  
same is according to the true meaning of the  
Act:—Held, also, that the conviction was in-  
valid because it did not negative that the liquor  
was made use of under the sanction of a medical  
man or minister of religion. Regina v. MacKen-  
zie, 6 O. R. 165.—Rose.

The offence was selling liquor to an Indian:—  
Held, no objection to a conviction under R. S.  
O. c. 181, for if so the defendant was guilty of

two offences, one under the latter Act, and one under the Indian Act. *Regina v. Young*, 7 O. R. 88.—Osler.

### III. LICENSES AND LICENSE FEE.

The defendant, a brewer licensed to manufacture ale, &c., at Palmerston, under a dominion license, had a cellar or vault at Brantford, where he stored such ale, &c., and sold it in quantities not less than allowed to be sold by wholesale:—Held, that the sale was authorized under the dominion license, and that a provincial license was not required. *Regina v. Young*, 8 O. R. 476.—Rose.

As the Quebec License Act does not interfere with the existing rights and powers of incorporated cities, a by-law passed by the corporation of the city of Three Rivers, on the 3rd April, 1877, in virtue of its charter (20 Vict. c. 129, and 38 Vict. c. 76), imposing a license fee of \$200 on the sale of intoxicating liquors, is within the powers of the said corporation. *Sulte v. Corporation of the City of Three Rivers*, 11 S. C. R. 25.

See *Re Croome and The Municipal Council of the City of Brantford*, 6 O. R. 188, p. 360.

### V. SUBMISSION OF CANADA TEMPERANCE ACT, 1878 TO ELECTORS.

#### 1. Generally.

The defendant was convicted of having sold intoxicating liquors on 16th December, 1884, at the township of Oakland, in the county of Brant, being the day on which the vote for the passage of the Canada Temperance Act for the county of Brant was taken. The townships of Oakland and Burford, in the county of Brant, had been for the purposes of dominion elections separated from the county of Brant and annexed to the adjoining county:—Held, that the word "county," as used in the Canada Temperance Act, 1878, means county for municipal and not for electoral purposes. *Regina v. Sharekaur*, 11 O. R. 727.—Q. B. D.

Certain portions of the county of Brant consist of Indian lands, and the sale of liquor in these lands is regulated by the Indian Act of 1880 and amendments thereto:—Held, that under the eighth objection to the conviction—that it did not appear that the votes of the electors on the Indian lands in the county were taken upon the petition for the Act, or that proper means were taken to enable them to exercise their franchise, or that they were permitted to exercise it—the present proceedings did not properly bring the matter before the court. *Ib.*

On an application to quash a conviction under the Temperance Act, 1878:—Held, that the adoption of the Act is on the day of polling. *Regina v. Halpin—Regina v. Daly*, 12 O. R. 330.—Galt.

#### 2. Scrutiny of Votes.

A judge of the County Court, in holding a scrutiny of the votes polled at an election under the provisions of the Canada Temperance Act, has only to determine the majority of votes cast, on one side or the other, by inspection of the ballots used in the election, and has no power to

inquire into offences against the Act, and allow or reject ballots as a result of such inquiry. (Henry, J., dubitante.) *Chapman v. Rand*, 11 S. C. R. 312.

Held, affirming the judgment of Rose, J., 9 O. R. 154, that a county court judge will not be compelled by mandamus to enquire, on a scrutiny of ballot papers, under sections 61, 62, 63 of the Canada Temperance Act, 1878, (1) as to personation, (2) bribery, (3) the status on the voters' list of persons voting. *Re Canada Temperance Act*, 12 A. R. 677.

### V. BY-LAWS FIXING NUMBER OF LICENSES.

Held, that a by-law passed by a city respecting saloon and shop licenses did not require to state the number of inhabitants of the city so as to shew on its face that the number of licenses fixed was within the statutory limit. *Re Croome and the Municipal Council of the City of Brantford*, 6 O. R. 188.—Rose.

A provision in the by-law limited the number of licenses "for the ensuing year, beginning on May 1st, 1884, or for any further license year until this by-law is altered or repealed:—Held, valid. *Ib.*

A further provision was, being merely a re-enactment of the statute, that the by-law should remain in force until altered or repealed:—Held, unobjectionable. *Ib.*

An objection that the by-law provided for a duty in excess of \$200, which, it was urged, should have been submitted to the electors by separate by-law, was overruled, because in fact the by-law contained no such provision. *Ib.*

Quere, whether several matters, each of which requires the assent of the electors, can be enacted in one by-law, or whether there must be separate by-laws separately submitted to the electors. *Ib.*

The by-law did not state whether it was passed under the Dominion or Local legislation:—Held, that as it stated no particular power as its basis it must be judicially regarded as emanating from that power which would authorize its passage. *Ib.*

Semble, if the Dominion legislation was in force, then, even if passed under the Ontario Act, under sec. 146 of the Dominion Act, which provided that all local laws passed for regulating or restraining the traffic in liquors were to be in force until 1st May, 1884, it was in force when passed and until repealed by that section, and if so repealed was no longer in force and could not be quashed: if however the Ontario Act was in force then it was valid under that Act; and the sending a certified copy of the by-law to the inspector under sec. 44, sub-s. 2 of the Dominion Act did not disentitle the applicant to invoke the aid of the Ontario Act in its support. *Ib.*

Another provision was, that "Every person receiving a shop license shall confine the business of his shop solely and exclusively to the keeping and selling of liquor:—Held, that this was not ultra vires and in restraint of trade. *Ib.*

It was also objected that sec. 35 of the License Act of 1884, 47 Vict. c. 35 (Ont.), in effect repealed the by-law, as it made the duty more than \$200, and the council had not submitted the question to the electors:—Held, that if re-

pealed it is the effect of duty to the by-laws prior to the by-law as under.

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pealed it could not be quashed; but Semble, that the effect of the section was to add the increased duty to the amount already provided for by the by-laws previously passed unless the council saw fit prior to the 15th April, 1884, to amend the by-law as to the license duty payable thereunder. *Ib.*

No seal was affixed to the by-law, but an impression of the seal was made thereon:—Held, sufficient. *Ib.*

## VI. INFORMATIONS.

Section 91 of the "Liquor License Act, 1863," 46 Vict. c. 30 (Dom.), amended by 47 Vict. c. 32, s. 16 (Dom.), applies only to localities in which the Canada Temperance Act is not in force. In this case, the information was for selling liquor, and the conviction was for "selling intoxicating liquor and having hotel appliances in the bar-room and premises":—Held, that even if a double offence had been charged in the information the magistrate had power to drop one and proceed on the other; but that in this case a second offence under sec. 118 of the Canada Temperance Act was not embraced in the words used. *Regina v. Kemp*, 10 O. R. 143.—Wilson.

An information under the "Scott Act" can be laid before one justice, although two must try the case. *Ib.* But see next case.

It is imperative, under sec. 105 of the above Act, (12 O. R. 367) that an information thereunder be laid before two justices, and that they both be named in the summons. Where, therefore, a summons stated that an information had been laid only before the justice who signed it, and yet called upon the defendant to appear before another named justice as well:—Held, that the justices had no jurisdiction, and that the defendant's appearing before them did not confer it. A conviction was therefore quashed. *Regina v. Ramsay*, 11 O. R. 210.—Galt.

Held, in this case that there was no variance between the information and conviction because the former used the expression "disposal," and the latter "sale," and that if there had been, an amendment of the information would have been made under secs. 116, 117, 118 of the Canada Temperance Act, 1878. *Regina v. Hodgins*, 12 O. R. 367.—Wilson.

## VII. CONVICTIONS.

### 1. Evidence.

#### (a) Of Prior Conviction.

Held, that sec. 122, sub-s. 2, of the C. T. Act, 1878, does not dispense with strict proof by production of the original record or otherwise of previous convictions where it is sought to impose the increased penalty under sec. 100, and that the certificate mentioned in the section can only be admitted as proof of the number of such convictions. *Regina v. Kennedy*, 10 O. R. 396.—O'Connor.

The defendant was charged with selling liquor contrary to the provisions of the second part of the "Canada Temperance Act, 1878." The information charged a previous conviction for an offence under the said Act, as follows: "The informant says that the said James Kennedy was

previously convicted of an offence against the said Act." A certificate by the convicting magistrate of a prior conviction was put in at the trial under sec. 122, sub-sec. 2, of the Act, for the purpose of proving such previous conviction:—Held, that proof of the fact set out in the report constituted no evidence of any offence, and that the police magistrate had therefore no jurisdiction, and the right to certiorari was therefore not taken away by sec. 111 of the Act. *Ib.*

#### (b) Other Cases.

In proceedings for selling liquor on Sundays, it was not shewn that the defendant had a license, or that the place in which the liquor was sold was one where intoxicating liquors were or might be sold by wholesale or retail, pursuant to section 48 of the Act:—Held, that the conviction was bad. *Regina v. Rodwell*, 5 O. R. 186.—Rose.

By R. S. O., c. 181, s. 86, where the act or omission complained of is one for which, if the defendant were not duly licensed, he would be liable to a penalty under the Act, the burden of proving that he is licensed is on the defendant:—Held, no objection to a conviction that it did not show defendant was not licensed. *Regina v. Young*, 7 O. R. 88.—Osler.

Held, that under sec. 123 of the C. T. Act, 1878, by which the accused is made a competent and compellable witness, he is not bound to criminate himself. *Regina v. Halpin*; *Regina v. Daly*, 12 O. R. 330.—Galt. Not followed in *Regina v. Fer*, 13 O. R. 590.

The defendant was convicted before the police magistrate of the town of S., for unlawfully keeping for sale intoxicating liquor, &c., at the said town contrary to the Canada Temperance Act, 1878. The depositions were to that effect, and the evidence shewed that the liquor was found upon the premises of the defendant in the said town:—Held, that the local jurisdiction of the police magistrate sufficiently appeared. *Regina v. Doyle*, 12 O. R. 347.—Wilson.

Before any complaint or charge was made against the defendant, a search warrant was issued and executed, and evidence obtained upon his premises, under which he was convicted:—Held, that a search warrant under the C. T. Act, 1878, is a proceeding to sustain a charge made for an offence committed against the Act, and not a proceeding taken upon which to found a charge to be made in case liquor is found on the premises:—Held, however, that although the search warrant was illegally issued the evidence obtained under it was admissible against the defendant. *Ib.*

The defendant was charged with the offence of keeping liquor for sale contrary to the provisions of the second part of the Canada Temperance Act. Evidence was given of the finding of certain of the appliances mentioned in s. 119:—Held, that apart from the presumption created by that section upon the finding of such appliances, such finding was evidence of a keeping for sale, of the weight of which the magistrate was the proper judge. *Regina v. Brady*, 12 O. R. 358.—Wilson.

The fact that the Canada Temperance Act, 878, (second part) is in force in any county, &c., must be proved like any other fact necessary to give jurisdiction. *Regina v. Elliott*, 12 O. R. 524.—Rose.

## 2. Penalty and Punishment.

The defendant was convicted under section 41 of the Liquor License Act, R. S. O. c. 181, for selling liquor without a license, and under section 46, for allowing liquor sold by him to be consumed on the premises; and one penalty was inflicted "for his said offence."—Held, bad, in not showing for which offence the penalty was imposed. *Regina v. Young*, 5 O. R. 184 a.—Rose.

Convictions imposing the increased penalties for second and third offences, under the Liquor License Act, s. 52, are bad unless proceedings have been taken for the first offence. *Regina v. Rodwell*, 5 O. R. 186.—Rose.

Held, also, that the punishment for offences against sec. 43 must be either imprisonment with hard labour or a fine; and that such imprisonment in the event of non-payment of the fine could not be awarded, but only imprisonment without hard labour. *Id.*

A penalty of thirty days imprisonment in default of sufficient distress for the fine was imposed:—Held, good under R. S. O. c. 181, sec. 51 and 59 of the Act. *Regina v. Young*, 7 O. R. 89.—Osler.

Semble, that notwithstanding *Fitzgerald v. McKinlay*, 21 C. L. J. 299, the informer, under C. T. Act, 1878, may be entitled to half of the fine. *Regina v. Kemp*, 10 O. R. 143.—Wilson.

Held, that when a distress warrant has been issued and returned, the truth of the return cannot be tried upon affidavits. *Regina v. Sanderson*, 12 O. R. 178.—Osler.

It was alleged but denied, that the bailiff had refused to receive the penalty and costs:—Held, however, that his duty was to execute the warrant of commitment, and that he had no authority to receive such payment. *Id.*

The warrant of commitment which was not issued until after the return of the distress warrant, was dated the 14th June, and the distress warrant was not returned before the 17th June:—Held, that the warrant of commitment need not be dated at all if not issued too soon. *Id.*

The conviction in this case was for a second offence and imposed imprisonment in default of payment of the fine and no distress:—Held, that secs. 57 and 62 of the Summary Convictions Act, which form a part of the Canada Temperance Act, authorized imprisonment not exceeding three months in default of sufficient distress. *Regina v. Doyle*, 12 O. R. 347.—Wilson.

Quære, whether for a third offence under the Canada Temperance Act a fine of \$100 cannot also be imposed in addition to imprisonment. *Id.*

The magistrate ordered the defendant to pay \$1 for the use of the hall for trying the case, and condemned the defendant, in default of distress,

to imprisonment:—Held, that in ordering payment of this sum there was a clear excess of jurisdiction, and that ordering distress, &c., was a further excess, and that the matter was one of principle and not of form, and the conviction was quashed. *Regina v. Wallace*, 4 O. R. 127, and *Regina v. Walsh*, 2 O. R. 206, commented on. *Regina v. Elliott*, 12 O. R. 524.—Rose.

See *Regina v. MacKenzie*, 6 O. R. 165, p. 358; *Poulin v. The Corporation of Quebec*, 9 S. C. R. 185, p. 358; *Regina v. Brady*, 12 O. R. 358, p. 363.

## 3. Amendment of.

Held, that an amended conviction cannot be put in after the return of a writ of certiorari. *Regina v. MacKenzie*, 6 O. R. 165—C. P. D.

Where a conviction did not on its face shew that the C. T. Act, 1878, was in force, the court on the merits allowed the return to be amended so as to shew jurisdiction, and for this purpose allowed a further return of the "Gazette" produced as an exhibit, but not filed. *Regina v. Elliott*, 12 O. R. 524.—Rose.

## 4. Costs of Applications to Quash.

Costs of the application to quash a conviction will be adjudged against a private prosecutor where he lays an information without having reasonable ground for believing that the charge will be sustained by proper evidence. *Regina v. Kennedy*, 10 O. R. 396.—O'Connor.

See *Regina v. Ryan*, 10 O. R. 254, p. 365.

## 5. Removal by Certiorari.

Held, that the conviction not having been made by a stipendiary magistrate, &c., under s. 111 Canada Temperance Act, 1878, was appealable or removable by certiorari. *Regina v. Kemp*, 10 O. R. 143.—Wilson.

In cases under the Canada Temperance Act, 1878, where a magistrate has jurisdiction, certiorari is absolutely taken away, but an appeal to the sessions still exists which, however, is itself also taken away by s. 111 of the Canada Temperance Act, 1878, when the conviction is before the stipendiary magistrate. *Regina v. Ramsay*, 11 O. R. 210.—Galt.

A prisoner having been convicted of an offence under the Canada Temperance Act, an application for her release was made under a habeas corpus, and a writ of certiorari was also issued:—Held, that the writ of certiorari must be superseded, and following *Regina v. Wallace*, 4 O. R. 127, that such writ cannot issue merely for the purpose of examining and weighing the evidence taken before the magistrate. *Regina v. Sanderson*, 12 O. R. 178.—Osler.

See *Regina v. McKenzie*, 6 O. R. 165, p. 74; *Regina v. Kennedy*, 10 O. R. 396, p. 362.

## 6. Appeal from Order Quashing.

The defendant who was convicted by two justices under the Canada Temperance Act removed his conviction by certiorari, and the same was quashed (10 O. R. 727). On appeal to this court:



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—Held, that there was no jurisdiction in this court to hear the appeal and the same was there-fore quashed with costs to be paid by the informant. *Regina v. Eli*, 13 A. R. 526.

#### 7. Other Cases.

Conviction held bad for not shewing the place where the offence was committed. *Regina v. Young*, 5 O. R. 184 a.

A conviction under R. S. O. ch. 181, for selling liquor without a license, purporting to be made by three magistrates, but signed by two only, was returned with a certiorari.—Held, if an objection at all, a ground for sending back the writ, that the third magistrate might sign the conviction, was not a ground for quashing it. *Regina v. Young*, 7 O. R. 88.—Osler.

Held, that the conviction in this case could not stand, inasmuch as it did not appear by the information on which it was founded what the nature of the previous offence was, or where it was committed or that it was of a similar nature to the fresh offence charged by the information. *Regina v. Kennedy*, 10 O. R. 396.—O'Connor.

For the offence of selling liquor contrary to the provisions of the "Canada Temperance Act of 1878," a summons was issued under 32 & 33 Vict. c. 31 (Dom.), made applicable to prosecutions for such an offence, but which was not personally served on the defendant, being merely left at his place of abode. The defendant did not appear before the magistrate at the time and place mentioned in the summons, whereupon the magistrate proceeded ex parte and convicted him:—Held, that the conviction must be quashed; and, as it appeared that the defendant had attempted to tamper with the informant, without costs. *Regina v. Ryan*, 10 O. R. 254.—Rose.

It was alleged that the prosecutions for offences against the Act were taken before the magistrates in this case because it "was notorious they were thorough-going Scott Act men," and that they had said that in no case of conviction would they inflict a less fine than \$50. It was also alleged that one of the justices was a member of a local committee for prosecuting offences against the Act, but it appeared he had resigned from the committee before the Act came into force in the county:—Held, that there was no disqualifying interest in the magistrates, nor any real or substantial bias attributable to them, nor any reason why they should not lawfully adjudicate in the case. The cases relating to disqualification by reason of favour or interest in a judge or magistrate discussed. *Regina v. Klemp*, 10 O. R. 143.—Wilson. Followed in *Regina v. Eli*, 10 O. R. 727.—O'Connor.

The magistrate at the close of the case made a minute of adjudication, in which he stated that he found the defendant guilty and imposed a fine of fifty dollars and costs, to be paid by a date named, and awarded imprisonment for thirty days in default of payment. Afterwards when drawing up the formal conviction, the magistrate adopted the form II, in the schedule to the Summary Convictions Act, directing that in default of payment by the day named, the penalty should be levied by distress and sale, and awarding imprisonment for thirty days in default of sufficient distress. Held (1) that the conviction

in the form II, was the proper conviction to be made, under the combined provisions of section 107 of the Canada Temperance Act, and sections 42 and 57 of the Summary Convictions Act, and not the form I2, to which form the minute of adjudication apparently pointed. (2) That the conviction was open to the objection that it did not correspond to the minute of the actual adjudication, and, therefore, could not be supported for want of jurisdiction in the magistrate to make it. (3) That under sections 117 and 118 Canada Temperance Act the Court, upon the motion to quash, might dispose of the case upon the merits upon the material returned with the certiorari, and that in this case the conviction, being warranted by the evidence, ought to be affirmed and the minute of adjudication amended so as to conform to it. *Regina v. Brady*, 12 O. R. 358.—Wilson.

A prisoner having been convicted of an offence under the Canada Temperance Act, an application for her release was made under a habeas corpus, and a writ of certiorari was also issued:—Held, that it was not necessary to serve a minute of the conviction on the defendant, as sec. 52 of 31 & 32 Vict. ch. 31 (Dom.), only requires such service in case of an order, and that defendant must take notice of the conviction at her peril. *Regina v. Sanderson*, 12 O. R. 178.—Osler.

It was alleged, that too large a sum had been charged for costs, but, held, that the conviction being regular on its face, and not shewing any excess of jurisdiction, such an irregularity (even if it existed) could not be enquired into on an application for prisoner's release. The prisoner was therefore remanded. *Ib.*

See *Regina v. MacKenzie*, 6 O. R. 165, p. 358; *Regina v. Young*, 7 O. R. 89, p. 359; *Regina v. Hodyins*, 12 O. R. 367, p. 364.

#### INVENTION.

See PATENT OF INVENTION.

#### INVESTMENT OF MONEY.

Held, that there was in the conveyance in this case a direction to invest in real estate, and following Joint Stock Discount Co. v. Brown, L. R. 3 Eq. 139, that "investing in" means "actual purchase." See *Re Barwick and Lot 3 on the north side of King street, in the City of Toronto*, 5 O. R. 710.

By solicitor for client. See *O'Callaghan v. Bergin*, 11 A. R. 594.

#### IRREGULARITY.

See PRACTICE.

#### JOINDER OF CAUSES OF ACTION.

See PLEADING.

## JOINDER OF PARTIES.

See PLEADING.

## JOINDER OF ISSUE.

See PLEADING.

## JOINT CONTRACT.

See *Clarke v. The Union Fire Ins. Co.*, 6 O. R. 635; *McMillan v. The Grand Trunk R. W. Co. et al.*, 12 O. R. 103.

## JOINT STOCK COMPANY.

See CORPORATIONS.

## JOINT TENANT.

Granting that a release by one joint tenant would extinguish the right of both, it does not follow that entering into a new agreement by one will prejudice the right of the other. *Clarke v. The Union Fire Ins. Co.—McPhee's Claim*, 6 O. R. 635.—Proudfoot.

## JUDGE.

I. OF COUNTY COURT—See COUNTY COURT.

II. OF HIGH COURT—See HIGH COURT OF JUSTICE—PRACTICE.

Cases relating to disqualification by reason of favour or interest in a judge or magistrate discussed. See *Regina v. Klemp*, 10 O. R. 149. See also *Regina v. Eli*, 10 O. R. 727.

## JUDGE'S REPORT.

See PARLIAMENTARY ELECTIONS.

## JUDGMENT.

I. SETTLING MINUTES, 368.

II. SIGNING JUDGMENT, 368.

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XXI. APPEALS TO SUPREME COURT—See SUPREME COURT OF CANADA.

XXII. FRAUDULENT JUDGMENT—See FRAUDULENT JUDGMENT.

XXIII. AGAINST ABSCONDING DEBTOR—See ABSCONDING DEBTOR.

XXIV. REVIVING JUDGMENTS—See SCIRE FACIAS AND REVIVOR.

## I. SETTLING MINUTES.

The entry of judgment, the minutes of which have been settled by a local registrar, does not preclude a party who at the time of such settling has given notice that he desires the minutes settled at Toronto, from afterwards obtaining a reference under Rule 416 O. J. Act. The court will rather encourage (at all events for some time) the settling of judgments such as are not included in the forms at the head office, because of the well understood phraseology in use by the two officers whose function it is to frame the terms of such judgments. *Holden v. Smith*, 10 P. R. 369.—Boyd.

## II. SIGNING JUDGMENT.

In an action on a promissory note the plaintiffs, in their statement of claim, claimed interest at the rate of seven per cent., without shewing any legal right to more than six per cent. The statement of defence having been held bad on demurrer, and leave to amend not having been asked or granted, the plaintiffs entered judgment for default of defence for the full amount of the principal and interest claimed:—Held, that it was the duty of the deputy clerk at the office where judgment was signed not to permit judgment to be entered for what the plaintiffs were not entitled to, and that there was no objection to the plaintiffs limiting their claim to six per cent. on signing judgment. *Bank of Hamilton v. Harvey*, 11 P. R. 145.—Osler.

## III. FOR DEFAULT OF DEFENCE.

See *Peel v. White*, 11 P. R. 177.

## IV. UNDER RULE No. 80.

Judgment may be obtained against a married woman under Rule 80, O. J. Act, but execution thereunder must issue against her separate estate only. *Kinnear v. Blue*, 10 P. R. 465.—Rose.

Judgment was granted under Rule 80, O. J. Act, in an action on a promissory note against

one of the dorsers, who of the Married Women's Act, c. 19, section 1, that separate estate judgment a separate property of the note, or have acquired from *Ridford et al.*

Judgment Act, in an action of the marriage before the 147 Vict. c. 13 Q. B. D. 10 P. R. 62.

Held, that the Act, 1884, respectively. for judgment married woman was now passing of the made no change the plaintiff Turnbull v. Scott v. W. J.

A prima facie 80. O. J. Act action upon married woman amongst other agent of husband on which the finding that once were interfere with Judge in default the plaintiff simply with the claim trial. *Nelson*

Rule 422 must be registered in the sub county judge local master at Hamilton leave to sign Act, in an defendant at St. Catharines office in 422 O. J. Act to make P. R. 170.

Where under marriage makes out order there defendant, in order he has a separate estate show the reason for the fact. *Colt*

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NTS, 375.  
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Rule 80, O. J.  
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one of the defendants, a married woman, as in-  
dorsor, where the note matured after the passing  
of the Married Women's Property Act, 1884 (47  
Vict. c. 19 (Ont.)), and where there was no al-  
legation that the married woman was possessed of  
separate estate. The order provided that the  
judgment should be levied out of the defendant's  
separate property (if any) which she was pos-  
sessed of or entitled to at the time of the making  
of the note, or which she may thereafter acquire  
or have acquired, and which she was not re-  
strained from anticipating. *The Quebec Bank v.*  
*Rutherford et al.*, 10 P. R. 619.—Dalton, *Master*.

Judgment was granted under Rule 80, O. J.  
Act, in an action on a promissory note against  
one of the defendants, a married woman, where  
the marriage and the maturity of the note were  
before the Married Women's Property Act, 1884  
(47 Vict. c. 19 (Ont.)), following *Bursill v. Tanner*,  
13 Q. B. D. 691. *Cameron v. Rutherford et al.*,  
10 P. R. 620.—Dalton, *Master*.

Held, that the "Married Women's Property  
Act, 1884," (47 Vict. c. 19, (Ont.)), is not retro-  
spective. A motion under Rule 80, O. J. Act,  
for judgment upon a promissory note against a  
married woman was dismissed in April, 1883, and  
was now renewed, fourteen months after the  
passing of the Act of 1884:—Held, that that Act  
made no change in the law which could assist  
the plaintiff, even if the matter were res integra.  
*Taribull v. Forman*, 15 Q. B. D. 234, followed.  
*Scott v. Wye et al.*, 11 P. R. 93.—O'Connor.

A *prima facie* case for judgment under Rule  
80, O. J. Act, was made by the plaintiff in an  
action upon two bills of exchange accepted by a  
married woman who, in her defence, alleged,  
amongst other things, that she accepted the bills  
as agent of her husband, but there being evidence  
on which the jury might have been justified in  
finding that the business, in which such accept-  
ances were given, was hers, the court refused to  
interfere with the discretion of the County Court  
Judge in directing judgment to be entered for  
the plaintiff, the defendant having declined to  
comply with the condition of paying the amount  
of the claim into court to abide the result of a  
trial. *Nelson v. Thorner*, 11 A. R. 616.

Rule 422 O. J. Act, and its sub-section (a)  
must be read together, and hence the limitation  
in the sub-section of the jurisdiction of the  
county judge in certain cases curtails that of  
local masters in similar cases. The local master  
at Hamilton, in the county of Wentworth, gave  
leave to sign final judgment under Rule 80 O. J.  
Act, in an action in which the solicitor for the  
defendant had his place of residence and office  
at St. Catharines, in the county of Lincoln and  
no St. Hamilton:—Held, that under Rule  
422 O. J. Act, the local master had no jurisdic-  
tion to make the order. *Freel v. Macdonald*, 10  
P. R. 170.—Boyd.

Where on moving for immediate judgment  
under marginal Rule 80 O. J. Act, the plaintiff  
makes out a *prima facie* case for granting an  
order therefor, it is not sufficient for the defen-  
dant, in opposing the application, to swear that  
he has a good defence on the merits:—he must  
shew the nature of his defence, and give some  
reason for thinking that such defence exists in  
fact. *Collins v. Hickok*, 11 A. R. 620.

A writ of summons was specially endorsed un-  
der Rule 14, O. J. Act, "The plaintiffs' claim  
is \$1,702.72 for money lent by the plaintiffs to  
the defendants, the same being the amount due  
to the plaintiffs' branch or agency office at P.,  
and interest thereon from the 1st day of Decem-  
ber, 1884, until judgment. On motion for judg-  
ment under Rule 80:—Held, that it was neces-  
sary for defendant's information to state the date  
at which his account was overdrawn to the  
amount specified, and that this endorsement was  
therefore insufficient. *Ontario Bank v. Burk*, 10  
P. R. 648.—Dalton, *Master*.

Held, that an order, for judgment under Rule  
80, cannot be made except in an action, where  
the plaintiff merely seeks to recover a debt or  
liquidated demand in money. *Standard Bank v.*  
*Wills*, 10 P. R. 159.—Ferguson.

Leave was given to sign final judgment under  
Rule 80, O. J. Act, against a company incorpo-  
rated in England, having its head office there,  
and in process of liquidation there, but doing  
business and having assets and liabilities in On-  
tario. *Plummer v. Lake Superior Native Copper*  
*Company*, 10 P. R. 527.—Rose.

In an action against the maker and endorsers  
of a promissory note, in answer to a motion under  
Rule 80, O. J. Act, for judgment, the defendants,  
the endorsers of the note, who it was said were  
accommodation endorsers, swore that they had  
received no notice of dishonour. The protest of  
the note was not produced by the plaintiffs on  
the first return of the motion:—Held, (on appeal  
from the Master in Chambers who ordered judg-  
ment) that as there was no evidence that the  
defendants had received notice of dishonour, and  
a distinct denial by them of such notice, the  
motion should have been refused. The protest  
having been produced after an enlargement:—  
Held, that being only presumptive evidence of  
the posting of the notice, it was not sufficient,  
in the face of the denial. The note was dated  
"Prince Arthur's Landing," and since the mak-  
ing of the note the place so called was incorpo-  
rated under the name of Port Arthur, the limits  
of the two places not exactly corresponding. One  
of the endorsers C. C. B. resided at Bowman-  
ville:—Held, that the sufficiency of a notice ad-  
dressed to C. C. B. at Port Arthur, was open to  
argument, upon which the defendant was entitled  
to have a trial, and on this ground judgment  
should not have been ordered. *Ontario Bank v.*  
*Burke et al.*, 10 P. R. 561.—Rose.

On a motion for judgment under Rule 80, O. J.  
Act, in an action on a promissory note the de-  
fendant filed an affidavit shewing that he was an  
accommodation maker and stating his information  
and belief to be, that the plaintiffs were aware of  
the fact that they held the note as collateral se-  
curity, and that they never gave any value for it,  
and further that since the making of the note M.,  
the payee, had become insolvent and made an  
assignment, and that there was litigation pend-  
ing between the plaintiffs and his assignee in  
respect of certain securities alleged to be held by  
the plaintiffs on account of his indebtedness. An  
affidavit of the plaintiffs' manager in reply was  
filed denying knowledge of the note being an  
accommodation one, and stating that it was dis-  
counted by the plaintiffs and the proceeds placed  
to M.'s credit:—Held, not a case in which judg-

ment could be ordered. *Hughson et al. v. Gordon*, 10 P. R. 565.—Rose.

The practice of moving under Rule 80, O. J. Act, for leave to enter final judgment after delivery of a statement of claim is not one to be encouraged, although in cases of necessity it may be allowable. Under the circumstances of this case, motion for judgment was refused. *Woodruff v. McLennan*, 11 P. R. 22.—Rose.

On an application, which was granted under Rule 80, for judgment against an Indian living with his tribe on their reserve, and not being the holder of any real or personal property outside the reserve:—Held, that since the repeal of C. S. C. ch. 9, there is nothing to prevent an Indian suing and being sued, although by the Indian Act of 1880, s. 77 (Dom.), the judgment will not bind any property of the Indian except that described in sec. 75. *Bryce, McMurich & Co. v. Salt*, 11 P. R. 112.—Dalton, Master.

#### V. UNDER RULE NO. 321.

Held, that the business in this case was not one protected by R. S. O., c. 125, s. 7; that the verdict could not be sustained; and under Rule 321, O. J. Act, and R. S. O., c. 50, s. 383, it was set aside and judgment entered for the defendant. *Murray v. McCallum*, 8 A. R. 277, referred to and distinguished. *Campbell v. Cole*, 7 O. R. 127.—Chy. D.

At the trial the jury answered all the questions left to them in favour of the plaintiff and judgment was entered for him, which the County Court Judge subsequently set aside, and entered judgment for the defendants:—Held, that under rule 490, O. J. Act, the same power is extended to the County Courts as is possessed by the High Court under Rule 321, and that the judge of the County Court was right in giving judgment in favour of the defendants instead of submitting the question to another jury. See, also, on the same point, *Stewart v. Rounds*, 7 A. R. 575, and *Williams v. Crow*, 10 A. R. 301. *McConnell v. Wilkins*, 12 A. R. 438.

Seemingly, if the evidence given will not warrant the court in granting a mandamus upon motion to the court, and the court has before it all the materials necessary for finally determining the question in dispute, judgment may be given for the defendants under Rule 321 of the Judicature Act. *Hispot v. The Township of McGillivray*, 12 O. R. 749—Q. B. D.

#### VI. UNDER RULE NO. 322.

In an action for the recovery of land the plaintiffs moved under Rule 322, O. J. Act, for final judgment upon the pleadings, the depositions of the defendant, taken on his examination for discovery, and upon an affidavit verifying a lease of the land in question to the father and brother of the defendant:—Held, affirming the decision of the Master in Chambers, that much care must be taken in such cases not to take away the right of trial on viva voce evidence; and that as the plaintiff's case was not conclusively made out, the motion was properly refused:—Quere, whether the lease in question was a document that under Rule 322, O. J. Act, could be proved on

this motion by an adverse affidavit without cross-examination. *Cook et al. v. Lemieux*, 10 P. R. 577.—Dalton, Master.—Rose.

#### VII. UNDER RULE NO. 324.

Held, that where an order for the signing of judgment under Rule 324, O. J. Act, was made in chambers instead of court, it must be taken advantage of by a summary application, and that its invalidity could not be set up in an action founded on it. *Martin v. Evans*, 6 O. R. 238.—Boyd.

G. O. Chy. 418 is controlled by the conflicting provisions of Rule 407, O. J. Act, hence two clear days notice of motion for judgment under Rule 324, O. J. Act, is sufficient. *Martens v. Birney*, 10 P. R. 368.—Boyd.

Leave was given to the plaintiff under Rule 324, O. J. Act, to sign final judgment, where the claim was upon a covenant by the defendant with the plaintiff to pay certain mortgages made by the plaintiff upon lands sold by him to the defendant, and for indemnity, and where the plaintiff was being sued for payment of four of the mortgages, but had not actually paid them. It was directed that the judgment to be entered should be for the amount of the four mortgages and interest, (to be computed by the registrar) and costs. Leave was reserved to the defendant to apply to be relieved from the judgment upon his satisfying the claim of the holder of the mortgages. *Clendennan v. Grant*, 10 P. R. 593.—Rose.

During the currency of a promissory note it was agreed between the indorsee and indorser that the note should be renewed at maturity, and from time to time on payment of a named sum. "If the renewal notes are continued in the same firm or names as at present." Before the maturity of the note the maker died. After its maturity in an action on the note against the endorser the defendant set up such agreement as a defence and alleged that he duly offered to perform it so far as lay in his power, by leaving the said note and liability of the maker and giving his note in renewal as agreed as collateral to the said note, which tender the plaintiff refused to accept, and which the defendant is at all times ready and willing to carry out. A motion for immediate judgment under Rule 324 was dismissed, the judge refusing to decide as to the legality of the defence on such motion. *The Federal Bank v. Hope*, 6 O. R. 209.—Rose.

#### VIII. UPON DEMURRER.

A defendant did not, within ten days after delivery of a demurrer to a paragraph of the statement of defence enter it for argument and give notice, nor serve an order for leave to amend, as required by Rule 195, O. J. Act:—Held, on an ex parte motion by the plaintiff for judgment upon his demurrer, that the proper practice in such a case is to apply to a judge in court, upon notice to the opposite party, for an order to strike out the pleading or part of the pleading demurred to, and for a direction as to payment of costs; but on the return of the motion the party in default will have no right to be

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ston v. Trout*, 10 P. R. 493.—Rose.

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peal to the Supreme Court of Canada. See  
*Shields v. Peck*, 8 S. C. R. 579; *Roblin v. Rankin*,  
11 S. C. R. 137.

#### IX. CROSS JUDGMENTS.

Where judgments were recovered in the same  
action by the plaintiff on his claim with general  
costs of action, and the defendant on his counter-  
claim with costs thereof, such claim and counter-  
claim arising out of the same subject matter,  
the judgment for counter-claim largely exceed-  
ing the former in amount, a set-off was allowed  
of so much of the money recovered by the de-  
fendant against the plaintiff on defendant's counter-  
claim as would cover the costs adjudged to  
the plaintiff on his recovery of judgment against  
the defendant notwithstanding the claim of the  
plaintiff's solicitors to a lien on the costs ad-  
judged to the plaintiff:—*Quere*, when a judg-  
ment, as in this case, has been framed without  
directing a set-off, whether a Judge in Chambers  
has power to direct it to the prejudice of the  
solicitor, so as to vary the decree of the court.  
*Brown v. Nelson*, 11 P. R. 121.—*Dalton, Mas-  
ter—Osler*.

The plaintiffs sued for freight for the carriage  
of timber, and the defendant pleaded a counter-  
claim for neglect and delay in the carriage of the  
timber. The judgment at the trial was as fol-  
lows: "The verdict will be for the plaintiffs for  
\$2,122, and for the defendants upon their counter-  
claim for \$1,420, and each party will be en-  
titled to costs against the other, as if the state-  
ment of claim and counter-claim were separate  
actions, and I direct that judgment be entered  
accordingly."—Held, reversing the decision of  
the Master in Chambers, that the judgments re-  
covered by the plaintiffs and defendants must be  
treated as judgments in separate actions, and,  
therefore, that in setting off the judgments the  
claim for costs of the defendants' solicitors upon  
the judgment against the plaintiffs should be  
protected. *Canadian Pacific R. W. Co. v. Grant*,  
11 P. R. 208—C. P. D.

#### X. INTERLOCUTORY JUDGMENTS.

The endorsement on the writ of summons  
claimed, in addition to pecuniary damages, an  
injunction restraining the defendants from dis-  
posing of certain goods:—Held, that interlo-  
cutory judgment signed by the plaintiff for default  
of appearance was irregular, and should be set  
aside. *McCallum v. McCallum*, 11 P. R. 16.—  
*Dalton, Master*.

See also *Shaw v. St. Louis*, 8 S. C. R. 385.

#### XI. DECLARATORY JUDGMENTS.

The plaintiff set up a verbal agreement made  
in 1873, between himself and the defendant C.,  
they being adjoining proprietors of land, to the  
effect that C. should build a house with its  
southern wall encroaching nine inches upon the  
plaintiff's land, and the plaintiff should be allow-  
ed at any time to use that wall as a party wall  
upon payment of half the expenses of its original

erection by C.; and the plaintiff alleged that  
shortly afterwards C. erected his building as  
agreed upon, and the plaintiff claimed to have the  
agreement put into writing, and executed by C.,  
so as to enable him to register it; and he asked  
a judgment declaring him entitled to all the  
rights and privileges contained in the verbal  
agreement. C. in his pleadings conceded the  
rights and privileges demanded by the plaintiff  
under the agreement:—Held, nevertheless, affirm-  
ing the decision of Ferguson, J., that the action  
must be dismissed, for there is no jurisdiction to  
ascertain and declare rights before a party in-  
terested has actually sustained damage. *Brooks  
v. Conley et al.*, 8 O. R. 549—*Chy. D.* But see  
48 Vict. c. 13, s. 5.

#### XII. AMENDMENT OF JUDGMENTS.

At any time before formal judgment issued by  
the court the judgment or part of it may be re-  
called and a term imposed or a change made.  
*Canadian Land and Emigration Co. v. The Muni-  
cipality of Dysart et al.*, 9 O. R. 495.—*Ferguson*.

An order was made by the Master in Cham-  
bers amending a judgment entered against C. as  
executrix, so as to make it a judgment against  
her personally; and also amending the writs of  
fi. fa. in the sheriff's hands so as to be conform-  
able with the judgment as amended. The order  
was made nunc pro tunc upon the allegation that  
all parties interested had consented, and that an  
execution at the suit of the M. Co. against C.  
personally had expired. On an application made  
by the M. Co. to set aside the order, on the  
ground that their writ had not expired, but was  
in full force; and that the effect of the amend-  
ment was to give plaintiff's writ priority, the  
master made an order setting aside his previous  
order, and directing the amendments made there-  
under to be struck out. On motion by way of  
appeal to the Divisional Court to rescind the last  
named order:—Held, *Cameron, C. J.*, dissent-  
ing, that the motion must be refused; for that  
though the M. Co. were strangers to the action  
in which the amendments were made, they had  
a locus standi to apply to have same set aside.  
*Glass v. Cameron*, 9 O. R. 712—C. P. D.

See *Brundage v. Howard et al.*, 13 A. R. 337,  
p. 94.

#### XIII. IMPEACHING JUDGMENTS.

In an action on a mortgage from defendant S.,  
the defendant H. being in possession, the latter  
claimed that plaintiff was bringing the action for  
the benefit of S., who was therefore, as well as  
the plaintiff, bound by a judgment in a former  
action, in which H., claiming title by possession,  
had succeeded against S. in having a lease from  
the latter to him set aside, the plaintiff, how-  
ever, not being a party to the action, and having  
acquired his title prior thereto. S. pleaded that  
the judgment in question was obtained by the  
perjury of H., stating the perjury:—Held, on  
demurrer, good. *Stewart v. Sulton et al.*, 8 O. R.  
341.—*Rose*.

In an action by a creditor against a shareholder  
for unpaid stock, in a company incorporated  
under 32-33 Vict. c. 13 (Dom.):—Held, (*Burton*,  
J., dissenting), that the shareholder under a plea

that the judgment was obtained by fraud was entitled to set up as a defence that the company had not in the original suit been served with process, under section 50, the person served as secretary not being such officer. Per Burton, J. A. Such an omission was an irregularity only which must be moved against promptly, and could not be the subject of a plea; but that fraud or collusion between the plaintiff and the company or its officers, would avoid the judgment, and could be set up by plea, but was not shewn by the evidence here. *Harvey v. Harvey*, 9 A. R. 91.

Where proceedings for a partition in a County Court have been terminated by an order confirming such partition and nothing remains to be done by way of enforcing the judgment, such judgment cannot afterwards be impeached on the ground of fraud or deception practised on the court otherwise than in resisting an action in which it is relied on, or by bringing an action for the express purpose of setting it aside. *Jenking v. Jenking et al.*, 11 A. R. 92.

Held, that the non feaseance of the wife in failing to appear or defend an action for divorce in a foreign court did not amount to collusion on her part so as to estop her from impeaching the validity of the decree made in that court. *Magurn v. Magurn*, 11 A. R. 178.

#### XIV. SETTING ASIDE JUDGMENTS.

Application to set aside judgment against husband and wife upon application of the wife refused, owing to long delay in making application. See *McLean v. Smith et al.*, 10 P. R. 145.

The plaintiff not appearing at the trial, which took place at the Picton Assizes, before Patterson, J. A., judgment was directed to be entered for the defendant, with costs. Application was subsequently made to the judge at the same Assizes to set aside the judgment and reinstate the case on the list. This was refused, the plaintiff not being then ready to go on. Application was then made by the plaintiff to the master in chambers, under Rule 270 O. J. Act, to set aside the judgment entered at the trial. This motion was enlarged before Rose, J., in chambers, who:—Held, that Rule 270 O. J. Act, does not give jurisdiction to the master or a judge in chambers in such cases. *Hilliard v. Arthur*, 10 P. R. 281. —Rose. Affirmed on appeal to Q. B. Div. *ib.* 426.

The judge who presides at the trial, and pronounces judgment by default for the defendant in the absence of the plaintiff, has power, under Rule 270 O. J. Act, when afterwards sitting as the court at Toronto, to set aside such judgment. *Hilliard v. Arthur*, 10 P. R. 281, distinguished. *Ross v. Carscallen*, 11 P. R. 104.—Ferguson.

Where judgment for defendant was given at a trial in consequence of the plaintiff's absence, and application was afterwards made to the judge at the sittings to reinstate the case, which he refused to entertain:—Held, that the plaintiff might nevertheless apply, under Rule 270 O. J. Act, to the Divisional Court at its next sittings to set aside the judgment, and for a new trial. *Wilson v. Irwin*, 10 P. R. 598.—Chy. D.

Setting aside judgment in Division Court. See *Re Foley v. Moran*, 11 P. R. 316.—Wilson.

An order of the 4th October, 1886, extended the time for the delivery of statement of claim till the 12th October, but provided if it was not so delivered, the action should stand dismissed, with costs. Upon failure to deliver in time, the defendant signed judgment dismissing the action:—Held, that notwithstanding the dismissal of the action, an order could properly be made under Rule 426 vacating the judgment, and further extending the time for delivering the statement, and the master in chambers had jurisdiction to make such an order. *Newcombe v. McLuhan*, 11 P. R. 461.—Wilson.

See *McLean v. Shields et al.*, 9 O. R. 699, p. 377.

#### XV. ESTOPPEL BY FORMER JUDGMENT.

The plaintiff in this action having a contract with a township corporation for constructing drains, the defendant occasionally cashed checks or orders on the corporation for him, and was also in the habit of supplying him with goods, on account of which the plaintiff gave him two orders. The defendant having sued the plaintiff on the common counts, the plaintiff pleaded payment. By the particulars in that action the now defendant claimed for goods sold and money lent, and gave credit for one item of \$300, received upon an order for that sum. He had a verdict for \$920, and the now plaintiff afterwards brought this action against him to recover back a sum of \$300, which he alleged had been received by the defendant on another order, but had not been credited in the former action:—Held, that the plaintiff was estopped by the former judgment. *Sedden v. Tutop*, 6 T. R. 607; *Chisholm v. Morse*, 11 C. P. 589, distinguished. *Sorenson v. Smart*, 5 O. R. 678.—Chy. D.

The letters of administration to an infant as administrator, were revoked after judgment against him in an action brought by him to recover certain assets of the estate, and new letters were granted to one P., who thereupon obtained an order of revivor in such action, directing the further proceedings to be carried on by P. as administrator and plaintiff. Before P. could move against the judgment the order of revivor was rescinded. P. in this administration action attacked the validity of the securities which the former administrator had impeached in the action referred to, whereupon the plaintiffs (who had been defendants in that action) applied to have it ruled that the judgment in such other action was res judicata against P. in this administration proceeding:—Held, that by the discharge of the order of revivor in the action, in which the plaintiff by revivor was suing in autre droit, such action was left without a plaintiff, and the judgment recovered was not under the circumstances an estoppel against P. *Merchants Bank v. Monteith*, 10 P. R. 467.—Hodgins, Master in Ordinary.

A recovery of a verdict in an action for libel against some of several parties concerned in the libel, and payment of the amount of verdict and all costs without judgment being entered, is a bar to an action against others for the same libel. *Willcocks v. Howell et al.*, 8 O. R. 576.—C. P. D.

This action as originally brought was to take the plaintiff's accounts under a postnuptial settlement, in which the plaintiff and the defendant

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D. J. R. were trustees, but after the hearing and before decree, a question was raised by amendment as to the liability of the defendant D. J. R., to pay certain moneys alleged to have been advanced by the plaintiff for the maintenance of his wife and children, and on the argument of this question judgment was given directing a reference as to such claim. Before the argument judgment had been rendered in the Superior Court of Quebec, on the same question in D. J. R.'s favour, and on the reference D. J. R. proved this judgment, contending that it concluded the matter, as being *res judicata*, though not pleaded:

Held, reversing the judgment of the Master in Ordinary, 10 P. R. 301, that D. J. R. had had no opportunity of pleading such judgment, and that it was therefore conclusive when set up in the Master's office without being pleaded. *Hughes v. Rees et al.*, 9 O. R. 198.—Proudfoot.

The defendant on hearing of the judgment having been entered against him in the court of Queen's Bench of Manitoba, instructed counsel to move to set same aside; but the application was refused on the ground that it was too late:—Held, that this did not preclude defendant from disputing the validity of the judgment on the action therein in this province. *McLean v. Shields et al.*, 9 O. R. 699.—C. P. D.

The defendant having been paid \$50,000 insurance moneys under various policies effected by him upon certain lumber, which had been burnt by a spark from an engine of the C. C. R. W. Co., afterwards brought action against the railway company and recovered a verdict of \$100,000; the jury finding that that "was the actual value of the lumber destroyed." The insurance companies now brought this action against him claiming that he was trustee for them for so much of the \$100,000 as represented the excess of the total moneys received by him over the amount of his loss, contending that he was estopped by the verdict from asserting his loss to be greater than that amount. The defendant, however, contended that his actual loss had exceeded the whole \$150,000:—Held, that he was not concluded from so contending by the finding of the jury in his action against the railway company, and that the utmost right of the plaintiffs was to have the amount recovered as damages from the railway company brought into account together with the moneys previously paid by the plaintiffs for insurance in order to ascertain whether the defendant had been more than fully compensated for his total loss by fire and other loss and outlay connected with the litigation, and for these purposes the matter was referred to the master. *The National Fire Ins. Co. et al. v. McLaren*, 12 O. R. 682.—Boyd.

See *Stewart v. Sutton et al.*, 8 O. R. 341, p. 374; *White et al. v. Nelles*, 11 S. C. R. 587, p. 402; *Farrow v. Tobin*, 10 A. R. 69, p. 203.

## XVI. FOREIGN JUDGMENTS.

To an action on a foreign judgment recovered in the Supreme Court of New York, the defendant set up as a defence that the cause of action accrued more than six years before the commencement thereof:—Held, on demurrer, a good defence, for under our law the foreign judgment is only deemed to constitute a simple contract debt,

and the period of limitation is governed by the *lex fori*, and not by the *lex loci contractus*. *North v. Fisher*, 6 O. R. 206.—Rose.

To an action on a judgment recovered in the Court of Queen's Bench, Manitoba, the defendant set up as a defence that he was not at or during the time proceedings were taken to recover the said alleged judgment, nor has he since been a resident of or domiciled within the said Province of Manitoba, and was not served with any process or notice of the said action, nor had he any opportunity of appearing in said action and defending same: and the said judgment was obtained in his absence and without his knowledge:—Held, following *Schibsy v. Westenholz*, L. R. 6 Q. B. 155, a good defence. *McLean v. Shields et al.*, 9 O. R. 699.—C. P. D.

The plaintiff sued upon a foreign judgment, which he had obtained against the defendant upon a covenant by the defendant to indemnify him against a mortgage made by the plaintiff to one G., who had foreclosed the mortgage and afterwards obtained judgment against the plaintiff on the covenant:—Held, that the effect of G. suing on the covenant in the mortgage after foreclosure was to open the foreclosure, and an allegation that the plaintiff had improperly concealed the fact of the foreclosure from the foreign court was no defence to this action. Held, also, that an allegation that G. had agreed to take the land in full satisfaction of his debt shewed no defence, but a mere verbal agreement without consideration. Held, also, that an allegation that the plaintiff had sustained no damage by the judgment and execution against him, and that the writs of *fi. fa.* against him were retained in the sheriff's hands under a fraudulent agreement between G. and the plaintiff, in order to sustain the proceedings against the defendant, shewed no fraud, and was no answer to the action. Per Wilson, C.J.—The defendant was not at liberty to set up in answer to this action matters which could have been pleaded in the original cause. *Paisley v. Broddy*, 11 P. R. 202.—Wilson—C. P. D.

See *Hughes v. Rees et al.*, 9 O. R. 198, p. 377; *Magurn v. Magurn*, 11 A. R. 178, p. 313.

## XVII. TIME OF TAKING EFFECT.

C., being in default on his mortgage of realty to the plaintiffs, in April, 1882, gave them a chattel mortgage, in consideration of which they agreed to allow him to remain in possession and take the year's crop. On the 2nd July, 1882, the plaintiffs took formal possession of the land. On the 17th July, 1882, the defendant, having obtained judgment against C., placed a *fi. fa.* in the hands of the sheriff, who seized the growing crops on the land in question on the same day, and sold them in August. The plaintiffs had commenced ejectment proceedings on the 15th June, and they signed judgment on the 30th September, in the same year. The plaintiffs claimed the crops, and an interpleader issue was tried:—Held, (affirming the judgment of the Common Pleas Division, 5 O. R. 371) that the defendant had the right on the 17th July, by virtue of the agreement made in April, to seize the crops as C.'s property. The seizure and sale having taken place before the judgment in eject-

ment, the rule that the judgment related back to the day of the commencement of the action, so as to make C. himself a trespasser from that date, could not avail the plaintiffs. *Hamilton Provident and Loan Society v. Campbell*, 12 A. R. 250.

See *McLaren v. Canada Central R. W. Co.*, 10 P. R. 328, *infra*; *McEwan v. McLeod*, 10 A. R. 96, *infra*.

#### XVIII. INTEREST ON JUDGMENTS.

Where an appeal is brought against a judgment in any personal action which is affirmed on appeal, interest on the judgment is by force of the statute allowed for such time as execution has been stayed by the appeal: but where the plaintiff refrained from entering up his judgment until after the decision in appeal, this court refused to order interest to be allowed on the amount of the verdict; leaving the plaintiff to apply to the court below for relief by entering the judgment *nunc pro tunc*. *McEwan v. McLeod*, 10 A. R. 96.

In endorsing a writ of execution to levy interest upon the amount of the judgment, the interest is to be computed from the day of pronouncing the judgment, not from the day of the formal entry thereof. Rules 326 & 351 O. J. Act, are not inconsistent. *Keleher v. McGibbon*, 10 P. R. 89.—Dalton, *Master*.

On the 23rd of January, 1882, the following judgment was pronounced in court by Osler, J. A.:—"I direct judgment to be entered for the plaintiff against the within named defendants after the fifth day of next Hilary Sittings, for \$100,000." Hilary Sittings ended on the 25th February, and judgment was formally entered with the clerk of the court on the 24th March as of the 23rd January:—Held, that Rule 326 did not apply to this case; that the judgment should be dated on the day of its entry with the clerk, and from that date only, under Rule 327, interest should run. *Keleher v. McGibbon*. 10 P. R. 89 explained. *McLaren v. Canada Central R. W. Co.*, 10 P. R. 328.—Dalton, *Master*.

#### XIX. ASSIGNMENT OF JUDGMENTS.

Where one having obtained an assignment of a judgment against a mortgagor, brought action in his own name against the mortgagee, who had sold under the power of sale, to make him account for certain surplus moneys left in his hands after such sale:—Held, that the plaintiff was entitled so to sue, and that such assignment was not in contravention of the law respecting champerty and maintenance. *Harper v. Culbert et al.*, 5 O. R. 152.—Ferguson.

Right of surety against principal upon assignment of judgment. See *Harper v. Culbert et al.*, 5 O. R. 152; *Victoria Mutual v. Freel*, 10 P. R. 45.

See *Field v. Galloway*, 5 O. R. 502, p. 112.

#### XX. EFFECT OF JUDGMENT IN FORMER PROCEEDINGS.

The plaintiff company having brought an action against I. on a mortgage, and claiming

damages for having made a distress on F., the tenant of the premises, at the request of I., on the reference to ascertain what damage the company had properly sustained by reason of such distress, the master held that the amount of a judgment recovered by F. against the company was the proper measure, and was conclusive evidence of the amount, although it was proved before him that an offer had been made by I. to the company to furnish witnesses and assist in the defence, and had been declined, and the witnesses when examined shewed that their evidence might materially have affected the verdict:—Held, that the ruling of the master was erroneous, and that the case must go back to him to revise his report. *Peterborough Real Estate Investment Co. v. Ireton*, 5 O. R. 47.—Chy. D.

See also *VanVelsor et al. v. Hughson*, 9 A. R. 390.

See also Subhead XV. p. 376.

#### JUDGMENT DEBTOR.

See ATTACHMENT OF DEBTS.

#### JUDGMENT SUMMONS.

See DIVISION COURTS.

#### JUDICATURE ACT.

See HIGH COURT OF JUSTICE—PLEADING—PRACTICE—RULES AND ORDERS.

Held, Henry and Taschereau, JJ., dissenting, reversing the judgment of Cameron, J., 1 O. R. 433, that the O. J. Act, 1881, makes the High Court of Justice and its Divisions a continuation of the former courts merged in it, and that these courts still exist under new names. *Mitchell v. Cameron*, 8 S. C. R. 126.

Per Proudfoot, J.—By the effect of the Judicature Act all distinction between legal and equitable debts, and legal and equitable remedies is abolished. Debts of every kind are now recoverable in one forum, and the same forum enables creditors to reach every kind of assets, whether formerly legal or equitable, and the necessary result is, that the distinction between legal and equitable assets is at an end, and upon this subject the rules of law and equity being at variance, the latter are to prevail. *Bank of Toronto v. Hall*, 6 O. R. 653.

Quero, whether the third party clauses of the O. J. Act apply to Division Courts. *In re the Merchants Bank v. VanAllen*, 10 P. R. 348.—Osler.

References under. See ARBITRATION AND AWARD.

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- II. OF DIVISION COURTS — See DIVISION COURTS.
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- IV. OF MAGISTRATES—See JUSTICES OF THE PEACE—POLICE MAGISTRATES.
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## I. JURISDICTION AND DUTY.

1. *Disqualification by Reason of Interest*.

It was alleged that the prosecutions for offences against the Act were taken before the magistrates in this case because it "was notorious they were thorough-going Scott Act men," and that they had said that in no case of conviction would they inflict a less fine than \$50. It was also alleged that one of the justices was a member of a local committee for prosecuting offences against the Act, but it appeared he had resigned from the committee before the Act came into force in the county:—Held, that there was no disqualifying interest in the magistrates, nor any real or substantial bias attributable to them, nor any reason why they should not lawfully adjudicate in the case. The cases relating to disqualification by reason of favour or interest in a judge or magistrate discussed. *Regina v. Kemp*, 10 O. R. 143. —Wilson. Followed in *Regina v. Eli*, 10 O. R. 727, p. 383.

2. *Ousting Jurisdiction by Claim of Title*.

S. owned lot 38 in 8th concession of N. In 1866 he sold the west half of the lot to complainant, reserving a strip of thirty feet along the north line thereof as a road for himself and successors in title to and from the east half of the lot. S. put up a gate at the west limit of the land where it met the highway, which gate had been there from 1866 until removed by the defendants. Defendants were successors in title to S., and removed the gate in question as an obstruction, and were convicted for unlawfully and maliciously breaking and destroying the gate erected at the west end of said road, as the property of the complainant:—Held, that defendants were acting in good faith in claiming the right to remove the gate, and under fair and reasonable supposition of right, and the conviction was therefore quashed. Held, also, that the question of a fair and reasonable supposition of right to do the act complained of was a fact to be determined by the justice, and his decision upon a matter of fact would not be reviewed, but that this rule did not apply where, as here, all the facts shewed that the matter or charge itself was one in which such reasonable supposition existed; that is, where the case and the evidence were all one way and in favour of the defendant. *Regina v. Malcolm*, 20 O. R. 511, distinguished. Quere, whether a gate across a right of way is an obstruction in law. Held, also, that the proviso in 32-33 Vict. c. 22, s. 60, is to be read as applicable to sec. 29 and to the whole Act. *Regina v. McDonald*, 12 O. R. 381.—Wilson.

3. *Other Cases*.

Justices of the peace out of session have no jurisdiction to try misdemeanors in a summary manner, except on special statutory authority; and it was:—Held, therefore, that a conviction by two J. P.'s, under 46 Vict. c. 15 (Dom.), for assisting in the distilling of spirits contrary to that Act, must be quashed. *Regina v. Carter*, 5 O. R. 651.—Rose.

The magistrate, on the 12th of November, adjourned the case, by consent, for one week, for judgment, and against the protest of defendant's



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March, to go into force the 3rd April following, in anticipation of an Act, 45 Vict. c. 24 (Ont.), passed the 10th March, to go into operation the 2nd April then next ensuing. Sub-s. 2 of s. 8 of the Act subjects "such vendors of articles in respect of which a market fee may be now imposed as shall voluntarily use the market place for the purpose of selling such articles," whereas the 12th section of the by-law in question was, "any person or persons who shall voluntarily come upon the said market place, &c., for the purpose of selling," &c.:—Held, that "Vendors, who shall voluntarily use the market place for the purpose of selling" was not identical with or equivalent to "any person or persons who shall voluntarily come upon the said market place for the purpose of selling;" nor was the expression "use the market place for the purpose of selling" the same as "come upon the market place for the purpose of selling;" and that the conviction was bad on this ground also. *Regina v. Reed*, 11 O. R. 242.—O'Connor.

Held, also, that the conviction was bad, as differing from both statute and by-law, being for refusing to pay the fees on eight quarters of beef "exposed for sale," whereas, the 13th section of the by-law applied only to cases of butcher's meat exposed for sale. *Ib.*

The defendant was convicted of selling and delivering teas as the agent of P. W., a non-resident of the county, in violation of a by-law of the county of Bruce, the third section of which was a copy of sec. 1 of 48 Vict. c. 40 (Ont). The defendant, against the protest of his counsel, was called as a witness, and swore that he bought the tea in question from one W. of the city of London, and that he did not sell as the latter's agent, but on his own account; that he had formerly sold tea on commission for W. but purchased that in question for the purpose of evading the by-law. The conviction alleged that defendant was the agent of P. W., but did not state that he had not the necessary license to entitle him to do the act complained of:—Held, 1. That defendant being, under the evidence, an independent trader, and not an agent, did not come within the Consolidated Municipal Act, 1883, s. 495, sub-s. 3, nor within 48 Vict. c. 40 (Ont). 2. That the conviction was defective in not stating that P. W., was non-resident within the county, and that the expression "of the city of London" was not sufficient. 3. That defendant had been improperly compelled to give evidence against himself. 4. That the having a license is a matter of defence, and not of proof by the prosecution. 5. That the intention to evade the by-law was immaterial so long as the agency did not in fact exist. *Regina v. McNicol*, 11 O. R. 659.—Wilson.

47 Vict. (Ont.) c. 32, s. 13, sub-s. 12 enacts that by-laws may be passed "for regulating or preventing the ringing of bells, blowing of horns, shouting and other unusual noises, or noises calculated to disturb the inhabitants," &c. Section 2 of by-law No. 179 of the City of London, passed under that Act, is as follows: "No person shall, in any of the streets, or in the market place of the City of London, blow any horn, ring any bell, beat any drum, play any flute, pipe, or other musical instrument, or shout or make, or assist in making, any unusual noise, or noise calculated to disturb the inhabitants of the said

city." "Provided always, that nothing herein contained shall prevent the playing of musical instruments by any military band of Her Majesty's regular army, or any branch thereof, or of any militia corps lawfully organized under the laws of Canada." The prisoner was convicted under the by-law of beating a drum on a public street in the City of London:—Held, that the by-law so far as it sought to prohibit the beating of drums simply, without evidence of the noise being unusual, or calculated to disturb was ultra vires, and invalid, and that the refusal to receive evidence on the prisoner's behalf was a valid ground for her discharge. Held, also, that the above proviso was not an exception that must be negatived in either the commitment or conviction. *Regina v. Nunn*, 10 P. R. 395.—Rose.

A conviction was, that the defendant did, on the 16th May, 1886, create a disturbance on the public streets of the village of L., by beating a drum, &c., contrary to a certain by-law of the village. The information was in like terms except that the act was laid as done on Sunday. The by-law was passed under 47 Vict. c. 32, s. 13 (Ont.) whereby power was given to pass by-laws, (sub-s. 12) "for regulating or preventing the ringing of bells, blowing of horns, shouting, and other unusual noise or noises, calculated to disturb the inhabitants." The by-law was, "the firing of guns, blowing of horns, beating of drums, and other unusual or tumultuous noises in the public streets of L., on the Sabbath Day, are strictly prohibited." The only evidence was that given by a person who said he "saw" the defendant "playing the drum on the streets of L." on the day in question:—Held, that the conviction was bad in not alleging that the beating of the drum was without any just or lawful excuse:—Semble, that it could not be inferred from the evidence that the drum made any unusual noise, as the witness did not say he heard any noise, but only that he saw the defendant beating a drum:—Semble, also, that the words used in the statute that the noise made must be "calculated to disturb the inhabitants," and in the conviction that the defendant "did create a disturbance by \* \* the beating a drum," were not equivalent terms. *Regina v. Martin*, 12 O. R. 800.—Wilson.

The Municipal Act, 1883, sec. 510, authorizes the licensing of owners of livery stables and of horses, &c., for hire. A by-law passed under this section required every person owning or keeping a livery stable or letting out horses, &c., for hire to pay a license fee. Defendant was convicted under this by-law, for that "he did keep horses, &c., for hire" without having paid the license fee:—Held, that the conviction was in conformity with both statute and by-law. *Regina v. Sivalwell*, 12 O. R. 391.—Wilson.

#### (b) Infliction of Fines and Penalties.

A conviction under 32-33 Vict., c. 28, for keeping a house of ill-fame, ordered payment of a fine and costs, to be collected by distress, and in default of distress ordered imprisonment:—Held, good. *Regina v. Walker*, 7 O. R. 186.—Rose.

A conviction, in this case for keeping a disorderly house and house of ill-fame, was:—Held

bad for awarding, after the adjudication of a penalty by fine and imprisonment, further imprisonment in default of sufficient distress or of non-payment of the fine; and Held, also, that this was not a mere formal defect within section 39 of 32-33 Vict. c. 32, (Dom.) *Regina v. Richardson*, 11 P. R. 95.—Osler.

A conviction under the "Ontario Medical Act" (R. S. O. ch. 142, sec. 40), for practising without being registered, was quashed, because in default of payment of the fine imposed, distress was also awarded. *Regina v. Sparham*, 8 O. R. 570.—Rose.

The conviction and warrant of commitment ordered the defendant to be imprisoned for six months, and to pay within the said period to said magistrate the sum of \$100 without costs to be applied according to law, and in default of payment before the termination of said period, further imprisonment for six months:—Held, bad, for uncertainty in requiring the fine to be paid to the magistrate personally instead of to the gaoler. *Regina v. Newton*, 11 P. R. 98.—O'Connor.

Held, that the conviction was bad, because, while covering two several and distinct offences under the same by-law, it imposed only one penalty. *Regina v. Gravelle*, 10 O. R. 735.—O'Connor.

The magistrate ordered the defendant to pay \$1 for the use of the hall for trying the case, and condemned the defendant, in default of distress, to imprisonment:—Held, that in ordering payment of this sum there was a clear excess of jurisdiction, and that ordering distress, &c., was a further excess, and that the matter was one of principle and not of form, and the conviction was quashed. *Regina v. Wallace*, 4 O. R. 127, and *Regina v. Walsh*, 2 O. R. 206, commented on. *Regina v. Elliott*, 12 O. R. 524.—Rose.

Held following *Regina v. Brady*, 12 O. R. 358, that where imprisonment is directed on non-payment of a penalty, the award of distress of the goods to levy it, and then imprisonment in case the distress prove insufficient, is invalid in law, and an excess of jurisdiction. *Regina v. Lynch*, 12 O. R. 372.—Wilson.

Held, also, that the punishment being in excess of that which might have been lawfully imposed, the defect was not cured by secs. 2 and 3 of 49 Vic. c. 49, (Dom.) *Ib.*

#### (c) Other Cases.

The conviction in this case was bad, as there had been no offence committed against the Act 32-33 Vict. c. 21, s. 110 (Dom.), under which the defendant had been convicted, and also in not shewing the time and place of the commission of the offence. See *Regina v. Young*, 5 O. R. 400.—Boyd.

The defendant was convicted under the proceedings taken under 32 & 33 Vict. c. 32 (Dom.), not 32 & 33 Vict. c. 28 (Dom.), for keeping a house of ill-fame. The conviction merely "ordered" but did not "adjudge" any imprisonment or any forfeiture of the fine imposed:—Held, bad, as substituting the personal order of the magistrate for a condemnation or adjudication. *Regina v. Newton*, 11 P. R. 98.—O'Connor.

#### 2. Amendment of.

Held, that an amended conviction cannot be put in after the return of a certiorari. *Regina v. MacKenzie*, 6 O. R. 165.—Rose.

A magistrate may amend his conviction at any time before the return of the certiorari. *Regina v. McCarthy*, 11 O. R. 657.—Galt.

#### 3. Return of.

In an action against two justices of the peace to recover a penalty for not making an immediate return of a conviction under R. S. O. c. 76:—Held, that it is a question for the jury whether, under the circumstances of any particular case, the return made is immediate, and that in a qui tam action the jury's finding for defendant should not be disturbed. In this case the conviction was made on the 31st August, and the magistrates withheld the return until the 15th September, expecting to receive the fine every day, and intending to return it with the conviction. The jury having been directed to find whether this was not "reasonably immediate" returned a verdict for defendants, which was upheld. *Longway v. Atkinson*, 8 O. R. 357.—Q. B. D.

Amendment of return. See *Regina v. Elliott*, 12 O. R. 524.

#### 5. Quashing.

##### (a) Generally.

The fraudulent removal of goods, under 2 Geo. II. c. 19, s. 4, is a crime, and a conviction therefor was consequently quashed, with costs against the landlord, because the defendant had been compelled to give evidence on the prosecution. *Regina v. Lackie*, 7 O. R. 431.—Rose.

A magistrate may amend his conviction at any time before the return of the certiorari, and the court refused to quash because of the previous return of a bad conviction, especially where this had not been filed. The objection that the defendant has pleaded guilty to a defective information is, under 32-33 Vict. c. 31, s. 5, (Dom.), not admissible. *Regina v. McCarthy*, 11 O. R. 657.—Galt.

The court refused to quash a conviction under the Canada Temperance Act, 1878, on the ground that one of the convicting magistrates had not the necessary property qualification, the defendant not having negatived the magistrate's being a person within the terms of the exception or proviso of sec. 7 of R. S. O. c. 71. *Regina v. Hodgins*, 12 O. R. 367.—Wilson.

See *Hunter v. Gilkison*, 7 O. R. 735, p. 390. See also *Regina v. Hall*, 8 O. R. 407; *Regina v. Arcott*, 9 O. R. 541; *Regina v. Organ*, 11 P. R. 497.

##### (b) Costs.

Quere, whether defendant should not get the costs of quashing a conviction made to test the law. See *Regina v. Jamieson*, 7 O. R. 149.—Rose.

Where a weighmaster instituted a prosecution for his own benefit, after warning, instead of

bringing conviction the costs. *Rose.*

A conviction appears to be a tamper with the law. *O. R. 254.*

Costs will be a reasonable one where he will be sued. *Kennedy,*

The order without execution he had failed to pay. *O. R. 372.*

When a return can be made. *Sander*

V.

In an action against a constable against the cost of action of them found case in which defective notice acted and proba claim was restitution was acquit or conceal *et al.*, 7 O.

Held, an action against the property of the entitled to be stolen, unless for some of the state party had

Held, the Superintendent of the jurisdiction affairs to the matter of the lawfully from the Held, also from custody of his that the defendant which was maliciously case, cou



bringing an action in the Division Court and the conviction was quashed, he was ordered to pay the costs. *Regina v. Hollister*, 8 O. R. 750.—Rose.

A conviction was quashed without costs where it appeared that the defendant had attempted to tamper with the informant. *Regina v. Ryan*, 10 O. R. 254.—Rose.

Costs of the application to quash a conviction will be adjudged against a private prosecutor where he lays an information without having reasonable ground for believing that the charge will be sustained by proper evidence. *Regina v. Kennedy*, 10 O. R. 396.—O'Connor.

The order to quash the conviction was made without costs because the defendant had taken so many exceptions to the conviction upon which he had failed, and because the merits of the complaint were against him. *Regina v. Lynch*, 12 O. R. 372.—Wilson.

#### 6. Warrant of Distress.

When a distress warrant, upon a conviction, has been issued and returned, the truth of the return cannot be tried upon affidavits. *Regina v. Sanderson*, 12 O. R. 178.—Osler.

#### V. ACTIONS AGAINST MAGISTRATES.

In an action against a justice of the peace and constable for having issued a search warrant against the plaintiff, for having and concealing a coat belonging to another:—Held, that the notice of action and statement of claim, being each of them founded upon a cause of action arising in a case in which the justice had jurisdiction, were defective for want of the allegation that the justice acted "maliciously, and without reasonable and probable cause;" and that the statement of claim was defective in not shewing a right to restitution of the property, although the plaintiff was acquitted of any wrongful taking, detention, or concealment of the same. *Howell v. Armour et al.*, 7 O. R. 363.—Q. B. D.

Held, also, that the plaintiff had no ground of action against the magistrate for not restoring the property to him, because he had been acquitted of the larceny, as the magistrate was entitled to detain it, if proved to have been stolen, until the larceny could be tried, or that, for some sufficient reason, no trial could be had, the statement of claim not alleging that the property had not been stolen. *Ib.*

Held, also, that the plaintiff had no ground of action against the magistrate for not restoring the property to him, because he had been acquitted of the larceny, as the magistrate was entitled to detain it, if proved to have been stolen, until the larceny could be tried, or that, for some sufficient reason, no trial could be had, the statement of claim not alleging that the property had not been stolen. *Ib.*

Held, that the defendant, who was a Visiting Superintendent and Commissioner of Indian affairs for the Brant and Haldimand Reserve, had jurisdiction under the statutes relating to Indian affairs to act as a justice of the peace in the matter of a charge against the plaintiff for unlawfully trespassing upon and removing cordwood from the Indian Reserve in the County of Brant.

Held, also, that the discharge of the plaintiff from custody on habeas corpus was not a quashing of his conviction on the above charge; and that the conviction remaining in force, and the defendant having had jurisdiction, the action, which was trespass for assault and imprisonment maliciously and without reasonable and probable cause, could not be maintained, but the action

should have been so; but that even if the form of action was right, there was no evidence of want of reasonable and probable cause. *Hunter v. Gilkison*, 7 O. R. 735.—Q. B. D.

For not returning conviction. See *Longway v. t. v. Avison et al.*, 8 O. R. 357, p. 388.

Held, that the effect of Rule 254 of the O. J. Act is to abolish all local venues as well those made so by statute as at the common law, except actions of ejectment. *Legacy v. Pitcher et al.*, 10 O. R. 620.—Q. B. D.; *Ireland v. Pitcher*, *Ib.*, 631.

Held, that the 4th section of R. S. O. ch. 73, as amended by 41 Vict. c. 8 (Ont.), prevents an action being brought for anything done under a conviction, whether there was jurisdiction to make the conviction or not, so long as the conviction remains unquashed and in force. *Arscott v. Lilley et al.*, 11 O. R. 285.—C. P. D. Affirmed by C. of A., 23 C. L. J. 235.

Held, also, though doubting, that the 17th section of said Act, which entitles the magistrate to full costs as between solicitor and client where in such action he obtains a verdict in his favour, has been repealed by the O. J. Act, s. 90, sub-s. 2, and Rule 428; and that such costs are now in the discretion of the court or judge. *Ib.* Reversed by C. of A., 23 C. L. J. 235.

In an action against justices of the peace for false imprisonment, &c., the Divisional Court (10 O. R. 631) ordered judgment to be entered for the plaintiff for \$25, the damages assessed by the jury, leaving the costs to be taxed according to such scale and with such rights as to set-off as the statute and rules of court might direct. Upon appeal from taxation:—Held, that the action being within the proper competence of the Division Court (unless the defendant objected thereto), the plaintiff should have costs only on the scale applicable to that court, and the defendants should have their proper costs by way of deduction or set-off. Held, also, Cameron, C.J., dubitante, that the effect of R. S. O. c. 73, s. 19, read in connection with sec. 12 of that Act, and with R. S. O. c. 43, s. 18, sub-s. 5, R. S. O. c. 47, s. 53, sub-s. 7, and R. S. O. c. 50, s. 347, is not to provide that the plaintiff should have costs on the Superior Court scale when his recovery is within the jurisdiction of an inferior court. Per Cameron, C. J.—The case came under sec. 18 rather than sec. 19 of R. S. O. c. 73. *Ireland v. Pitcher et al.*, 11 P. R. 403.—C. P. D.

#### LACHES.

I. DISMISSING FOR WANT OF PROSECUTION. See PRACTICE—PARLIAMENTARY ELECTIONS.

II. ENTITLING SURETY TO DISCHARGE. See PRINCIPAL AND SURETY.

III. IN CARRYING OUT CONTRACT. See SPECIFIC PERFORMANCE.

The fact that an applicant for a mandamus against a municipal corporation to levy sinking fund has been a ratepayer for years does not bar him because he did not apply earlier, as the

levying a rate for a sinking fund is an annual breach of duty, and upon any breach a right arises to have it corrected. *Clarke v. The Corporation of the Municipality of Palmerston*, 6 O. R. 616.—Proudfoot.

Semble, where there is sufficient distress on the property, and the municipality by its own laches puts it out of its power to distrain, sec. 100 of the Assessment Act does not avail to give the right to collect by action. *Carson v. Veitch*, 9 O. R. 706.—C. P. D.

Semble, that although a motion to quash a by-law cannot be entertained unless made within a year from the passing of the by-law, it does not follow that an application made within the year may not be successfully answered by shewing laches of the applicant, though in this case no such laches existed. *Re Einton v. The Corporation of the County of Simcoe*, 10 O. R. 27.—Wilson.

Held, that the delay (without any excuse) of a patentee for a period of a little more than a year and nine months, after full knowledge of an inadvertence and mistake in his original patent, and after professional advice on the subject, and after a reissue of the same patent in the United States, founded upon the same alleged inadvertence or mistake (during which period manufacture had been carried on in the United States under a reissue there), before the application for a reissue in this country, is fatal to the validity of the reissue here. *Kidder et al. v. Smart et al.*, 8 O. R. 362.—Proudfoot.

Per Spragge, C. J. O., the sale to the mortgagee in this case was a fraud on the plaintiffs, and they had not disentitled themselves to relief by delay as for all that appeared the real facts as to the purchase were unknown to them until just before the filing of the bill. *Faulds et al. v. Harper et al.*, 9 A. R. 537.

In vendor shewing title to lands so as to disentitle him to action for purchase money. See *McDonald v. Murray et al.*, 11 A. R. 101.

A railway company held not to be in a position to enforce the delivery of debentures by a municipality after the lapse of nine years from the passing of the by-law where a total change of circumstances had taken place, and when the period fixed by the plaintiffs charter for the completion of the railway had expired. *The Canada Atlantic R. W. Co. v. The Corporation of the City of Ottawa*, 12 A. R. 234.

The plaintiffs ordered goods from the defendant in Montreal to be shipped to them in Toronto and three several consignments were made, on which having been addressed to "J. H. C. & Co.," instead of "H. E. C. & Co.," never reached the plaintiffs, but was, after remaining eighteen months in possession of the carriers, in due course sold for payment of the charges thereon. The plaintiffs in ignorance of the non-receipt of the third consignment accepted and paid the defendant's draft for the amount of the invoices of the three consignments. Subsequently they discovered their error and demanded a return of the amount paid, which the defendant refused:—Held, that although the plaintiffs had had the means within reach during all this time of ascertaining the true position of matters, there was no duty cast on them in relation to the defendant which made their delay in discovering the mis-

take laches on their part, and that they were entitled to recover back the amount paid as money paid under a mistake of fact:—Semble, a demand of repayment or notice to payee of the mistake was necessary before action. *Clark v. Eckroyd*, 12 A. R. 425.

The plaintiff made an arrangement in T. with Y., an employee of a certain company, to discount their draft on B. & Co., for \$4989.65, at three months, and in pursuance of this arrangement a draft was drawn in H. by Y. in the company's name, on plaintiff, payable on demand to their own order, for \$4800, dated 23rd July, 1883. This draft was taken by Y. to defendants banking house at H., and there discounted by him, and the proceeds drawn by cheques in the name of the company. The draft was then forwarded by the defendants to their branch in T., and by them presented to the plaintiff for acceptance and payment. Plaintiff then discounted the first mentioned draft with the defendants at T., and with the proceeds paid the draft for \$4800. Plaintiff, about 11th September, 1883, discovered that both drafts had been forged by Y., and immediately notified defendants, at the same time demanding payment of the amount of the forged draft for \$4800, which was refused by defendants. Plaintiff paid the first mentioned draft at maturity:—Held, that plaintiff had not lost his right of action by his delay in discovering the forgery, there being no actual genuine party on the bill against whom defendants could have recourse, and no remedy having been lost by them by such delay. *Ryan v. The Bank of Montreal*, 12 O. R. 39.—Q. B. D.

Delay in objecting to order amending pleadings. See *Court v. Walsh*, 9 A. R. 294.

In application for interpleader order. See *Darling v. Collatton*, 10 P. R. 110.

In moving to set aside judgment against married woman. See *McLean v. Smith et al.*, 10 P. R. 145.

See *Thompson et al. v. Canada Fire and Marine Ins. Co. et al.*, 6 O. R. 291; 9 O. R. 284, p. 115; *McArthur v. The Queen*, 10 O. R. 191, p. 172; *Wheeler and Wilson Manufacturing Co. v. Wilson*, 6 O. R. 421, p. 110; *Lee v. McMahon*, 11 A. R. 555, p. 278; *Beatty et al. v. Neelon et al.*, 12 A. R. 50, p. 106; *Dainty v. Vidal*, 13 A. R. 47, p. 399. See also *Carwell v. Schofield*, 9 S. C. R. 370.

## LADING (BILLS OF.)

See BILLS OF LADING AND WAREHOUSE RECEIPTS.

## LAND.

I. ASSESSMENT OF—See ASSESSMENT AND TAXES.

II. DESCRIPTION OF—See DEED.

III. CLEARING LAND—See FIRE.

IV. CROWN LANDS—See CROWN LANDS.

V. INDIAN LANDS—See INDIAN LANDS.

VI. EXPROPRIATION OF—See MUNICIPAL CORPORATIONS—RAILWAYS AND RAILWAY COMPANIES.

that they were amount paid as fact:—Sembler, e to payee of the ction. *Clark v.*

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*Fire and Marine* O. R. 284, p. 115; . R. 191, p. 172; *ing Co. v. Wilson*, hon, 11 A. R. 555, ul., 12 A. R. 50, p. 47, p. 399. Se. R. 370.

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VII. IMPROVEMENTS ON LAND—See IMPROVE- MENTS ON LAND.

VIII. SALE OF—See SALE OF LAND.

IX. TITLE TO LAND.

1. Generally—See SALE OF LAND.

2. Jurisdiction of Courts—See COUNTY COURT—DIVISION COURTS—JUSTICES OF THE PEACE.

X. EXECUTION AGAINST—See EXECUTION.

XI. TRESPASS—See TRESPASS.

XII. OF INFANTS—See INFANT.

XIII. OF MARRIED WOMAN—See HUSBAND AND WIFE.

XIV. ROADS—See WAY.

XV. WASTE—See WASTE.

Quere, whether a person who has laid out land into town or village lots for sale cannot afterwards, if he find he cannot dispose of them as such, or for any other reason, replace his land as it was before. *In re Hon. G. W. Allan*, 10 O. R. 110. —Wilson.

#### LAND AGENT.

See PRINCIPAL AND AGENT.

#### LAND SCRIP.

See HALF BREEDS' RIGHTS.

#### LAND WARRANT.

See *McKenzie v. Dwight*, 11 A. R. 381, p. 277.

### LANDLORD AND TENANT.

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XI. DISPUTING LANDLORD'S TITLE, 402.

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### I. CONSTRUCTION AND OPERATION OF LEASES.

#### 1. Lease or License.

In an instrument by indenture, under the Short Forms of Leases Act, the plaintiff was described as lessor, and P. and H. lessees, the granting part being that the lessor did "give, grant, demise, and lease \* \* the exclusive right, liberty, and privilege of entering at all times for \* \* in and upon that certain tract of land situated \* \* reserving that portion thereof occupied, or hereafter to be occupied as roadway by a railway company named \* \* and with agents to search for, dig, excavate, mine, and carry away the iron ores in, upon, or under said premises," &c. The lessees were to have the right to use such timber found on the premises as might be required to carry on their operations, and such use of the surface as might be necessary for all the purposes appertaining thereto; also to pay taxes and to do statute labour assessed upon the premises; and they were not to allow any manufacture or traffic in intoxicating drinks upon said premises, or to carry on any business that might be deemed a nuisance thereupon, and there was a proviso that on the termination of the lease the lessor should have quiet possession, a proviso for re-entry in case of forfeiture, and a covenant by the lessor for quiet enjoyment:—Held, reversing the judgment of Patterson, J. A., a lease, and not a mere license. *Seymour v. Lynch*, 7 O. R. 471.—Q. B. D. Affirmed on appeal, 13 A. R. 525.

The plaintiff, by a lease under seal, leased to the defendant a shop, save and except the bottom portion of the east window, and save and except a portion of the shop described by metes and bounds. The defendant alleged that prior to his accepting the lease, and entering into the consideration for such acceptance, an independent and collateral parol agreement, separate and distinct from and not part of the lease, was entered into, whereby the defendant was to have permission or license to remove certain rough shelving, &c., and to fit up the shop, including the portion reserved by the plaintiff, with handsome and ornamental show cases, during the continuance of the term, so as to give the shop a uniform appearance for the defendant's benefit, and that in pursuance of such agreement, and with plaintiff's consent, the show cases were put in:—Held, that the evidence of such agreement was not admissible, as it would add to the written agree-

ment, and was not collateral thereto; but even if admissible, if it amounted to an easement or grant of an incorporeal right, it should have been under seal, and not being under seal, the license was a parol license, not incidental to a valid grant, and was revocable, and the fact that it was for consideration and for a term certain could make no difference. It was held also that the evidence failed to establish the alleged agreement, and that the plaintiff was not estopped from denying it. *McKenzie v. McLaughlin*, 8 O. R. 111.—C. P. D.

See *Roan v. Kronsbein*, 12 O. R. 197, p. 411.

## 2. Covenants.

### (a) Not to Assign or Sublet.

On May 19th, 1870, E. made a lease of certain household premises to P. for twenty-one years. On 30th June, 1871, P., with E.'s assent, assigned to J. B. On 10th April, 1877, E., who was merely a bare trustee for plaintiff, assigned the reversion to her. On 29th December, 1882, J. B., without plaintiff's knowledge or assent, assigned to C. B., who thereafter was in possession of the property, receiving the rents from sub-tenants and paying the rents under the principal lease to the plaintiff. The plaintiff had also received the rents prior to E.'s assignment to her. The lease was under seal, and was in the ordinary printed form, and purported to be under the Short Forms Act. The statutory covenants were prefaced by the words: "And the said lessee for himself, his heirs and executors, administrators and assigns hereby covenants with the said lessor, his heirs and executors, administrators and assigns in manner and form following, that is to say." Then followed the ordinary statutory covenants, except after the covenant "to repair" were the words "reasonable wear and tear and accidents by fire and tempest excepted," and after the covenant "not to assign or sublet without leave," the additional covenant "and not to carry on any business that shall be deemed a nuisance." The covenant not to assign (except as to the additional words) in the language used in covenant 7, column 2 of the Short Form of Leases Act:—Held, that the covenant not to assign or sub-let, &c., did not include assignees, as they could not be held to be named; and the prefatory words to the covenant would have no contrary effect; and therefore J. B.'s assignment to C. B. was no breach thereof; and this was equally so as to sub-letting by using the premises as a tenement house; and also from the fact of the user having been open and notorious both by P. and J. B. for some thirteen years a license to do so must be presumed. Quere, whether such covenant ran with the land, the authorities on the point being conflicting; but the County Judge, to whom the case had been referred, having found that it did so run, a Judge sitting in single Court refused to interfere. *Crawford v. Bugg*, 12 O. R. 8.—McDougall, Co. J.—Rose.

### (b) To Repair—Commission of Waste.

Held, that the covenant to repair, in this case, (supra), ran with the land; that J. B.'s liability as assignee of the term ceased on his assignment to C. B.; and he would only be liable for the

breaches, if any, which occurred prior thereto; and the covenant must be read as subject to the words, "reasonable wear and tear," &c. *Id.*

Held, also, that there could be no liability on defendants as executors of J. B. for breach of implied covenant by themselves and J. B. to use the premises in a tenant-like manner, for there being a lease under seal with express covenants, no such implied covenant would arise. *Id.*

Held, also, that an action of waste would lie notwithstanding the express covenant to repair; but there must be what would constitute waste. A mere breach of covenant, not amounting to waste, not being sufficient; but to maintain such action the plaintiff must have a vested interest in the reversion, at the time waste committed, so that her claim, if any, must be for waste committed after she acquired the reversion and up to J. B.'s assignment; but there could be no liability here, for as to J. B., it appeared his assignment was made more than a year prior to his decease; and the R. S. O. c. 107, s. 9, only applied to breaches committed by testator within six months prior to his decease; and that it was not necessary for the defendant to set this up as a defence, the onus being on plaintiff to shew she came within the statute; and as to the executors it appeared they had no interest in the term and had never intermeddled with the property. *Id.*

Held, also, that there was no breach of the covenant by defendant to repair according to notice because the notice was given to J. B. after he had parted with his interest in the term. *Id.*

Held, also that as to many of the alleged breaches they were such as came within the terms "reasonable wear and tear," while as to others the evidence failed to disclose the date when they occurred and therefore whether prior to the assignment to J. B. *Id.*

On December 5th, 1882, plaintiff by lease, made according to an Act respecting "Short Forms of Leases," R. S. O. c. 103, demised to defendant certain premises for a grocery and liquor store, for a term of years. In April, 1883, defendant made a door through an inner brick wall, to get access from the store to a portion of the premises previously reached only from the outside. Plaintiff at first objected to this, but afterwards practically assented to it. A partition, partly glass and partly wood, in which was a door, separated the office from the store. In April, 1885, defendant proceeded to move this partition nearer the centre of the store, substituting wood for the glass, closing up the door, and converting a front window into a door, so as to make the office a liquor store, to comply with the new law requiring a separation of liquors from groceries. Plaintiff claimed an injunction to prevent further waste, and a right to reenter for breach of the covenant to repair. The Judge at the trial found that no damage was done to the premises:—Held, 1. That the breaking through the brick wall, for the purpose of making the door, was a breach of the covenant to repair, but was not a continuing breach, and had been waived by the landlord. 2. That under the statutory covenant to repair, the tenant was bound to keep in repair not only the demised premises, but also impliedly all fixtures and things erected or made during the term which he had a right to erect or make: that

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## V. FORFEITURE OF LEASE.

In actions to re-enter for breach of a covenant in a lease, the court will, since the Judicature Act, dispose of questions in their equitable rather than their legal aspect in all cases where, under the former practice, the Court of Chancery would have relieved against the forfeiture. Thus in the present case, where the plaintiff claimed to recover possession of certain lands leased by her to the defendant on the ground of breach of the covenant for the payment of taxes, which breach the defendant afterwards remedied before statement of claim filed:—Held, that the action could not succeed. The above is emphatically one of the instances in which equity would relieve, the breach being no more than the omission of a mere money payment. *Buckley v. Beigle*, 8 O. R. 85.—Boyd.

See *Graham v. Lang*, 10 O. R. 248, p. 194; *Baker et al. v. Atkinson et al.*, 11 O. R. 735, p. 195.

## VI. SURRENDER OF LEASE.

The plaintiff was lessee of certain premises, the lease having nearly a year to run, when he was on or about the 13th of January, applied to on behalf of the defendant, the executor of the lessor, to surrender the remainder of his term, which he consented to do in consideration of \$250, agreeing to give up possession on the 1st of February. In consequence of negotiations between the parties interested, the plaintiff did not actually give up possession until the end of February, he agreeing to deduct a month's rent as reserved in the lease. Possession was accepted by the defendant's agent, but the defendant refused to pay the consideration agreed upon, alleging as a principal ground for such refusal the non-delivery of possession on the day named:—Held, that time was not by the agreement made of the essence of the contract, and the delay formed no defence to an action for the sum agreed to be paid. *Dainty v. Vidal*, 13 A. R. 47.

## VII. ATTORNMENT OF TENANT.

See *Mulholland v. Harman*, 6 O. R. 546, p. 209.

## VIII. RENT.

## 1. Apportionment of.

J. B. leased certain lots, A, B, C, D, E, & F, with other lands to the defendant. J. C. also, at the same time, leased lot G and other lands to defendant. J. C. then conveyed his reversion in lot G to J. B., and J. B. conveyed away the other lands mentioned in his lease to S. A. H. Defendant assigned all his interest in both leases to J. S. McM., with the knowledge that J. S. McM. intended to endeavour to procure a conveyance of the fee for the purpose of laying out the land in building lots, which he failed to do, and J. S. McM. assigned all his interest in lots A, B, C, D, E, F, and G, to C. Both J. S. McM. and J. C. paid rent to J. B., and after his death to his executrix the plaintiff. The rent of lots A, B, C, D, E, F, and G fell in arrear, and the taxes also were left unpaid. Plaintiff then recovered judgment in an action of ejectment against C., and took possession of the lots. In an action to re-

cover the unpaid rent and taxes accrued on these lots before the recovery in ejectment, in which it was contended that as the action was brought against the original lessee who had assigned the lease, and was one on the covenant resting in privity of contract and not in privity of estate, there could not be an apportionment of the rent as to these lots. It was:—Held, following *The Mayor, &c., of Swansea v. Thomas*, 10 Q. B. D. 48, that the rent was apportionable, and the plaintiff was entitled to recover. Held, also, that there was no eviction of the defendant by the lessor. Held, also, on the evidence, that although defendant might be a surety for the assignee, there was no release of the assignee, and consequently no discharge of the surety. Held, also, following *Barnes v. Bellamy*, 44 Q. B. 303, that the rent accrued from day to day, and was apportionable in respect of time accordingly. *Boulton et al. v. Blake*, 12 O. R. 532.—Ferguson.

## 2. Right to Deduct Taxes from Rent.

Certain property in the city of Toronto had been owned by B., and on his death in 1884, intestate, and without known heirs, defendant entered and leased the property to the plaintiff, the defendant agreeing to pay the taxes. In 1884, the taxes assessed for 1883 not having been paid, a distress was entered therefor, when the plaintiff paid them and claimed to deduct them from the rent. The assessment for 1883 was against B. as owner, of which he received notice, and he was similarly assessed and received notice for the two prior years. In the assessment roll the name of the street and property was given, but not the number of the house or lot, except an arbitrary number adopted by the assessment department for their convenience, and without information from the department the lot could not be discovered:—Held, that sec. 21 of the Assessment Act, R. S. O. ch. 180, which, in the absence of an agreement to the contrary, authorizes the tenant to deduct the taxes paid by him from his rent, only does so when he could be compelled to pay the same; and as, following *Chamberlain v. Turner*, 31 C. P. 490, there appeared to be no valid demand here, there was no right to collect the taxes, and therefore no right to deduct the same:—Quare, whether the description in the assessment roll was sufficient; but under the circumstances, and in view of the provisions of sec. 57 validating the roll as finally passed by the Court of Revision, B. probably could not have raised this objection to a distress or suit for the taxes. *Carson v. Veitch*, 9 O. R. 706.—C. P. D.

## 3. Occupation Rent.

No occupation rent should be charged against one who has been in occupation of land under mistake of title, in respect of the increased value thereof arising from improvements which are not allowed him. *McGregor v. McGregor*, 5 O. R. 617.—Chy. D.

## 4. Overholding Tenant.

Where a party who has held for a term at certain rent continues to occupy after the expiration of his term, it is presumed, if there is no evidence

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## IX. ACTION

## 1. Ejectment

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#### 5. Due on Assignment.

See *Graham v. Lang*, 10 O. R. 248, p. 194; *Baker et al. v. Atkinson et al.*, 11 O. R. 735, p. 195; *Fuchs v. Hamilton Tribune Co.*, 10 P. R. 409, pp. 121, 126.

### IX. ACTIONS AND PROCEEDINGS BY LANDLORD.

#### 1. Receipt of Rent after Action brought.

In ejectment plaintiff alleged a demise to defendant as a monthly tenant. Defence, a yearly tenancy. After notice to quit, and after action brought, plaintiff received from defendant a payment on account of rent, which he shortly afterwards returned to defendant:—Held, affirming the judgment of Rose, J., at the trial, that there is no distinction in principle between the effect of payment of rent, as such, after action brought, upon the determination of the tenancy by notice to quit and by forfeiture, and that therefore the payment of rent in this case after action brought, had no effect upon this action, either as a bar to it or as a waiver of the notice to quit:—Held, that the intention with which the rent was received must be considered. *Lacton v. Rosenberg*, 11 O. R. 199.—Q. B. D.

### X. ACTIONS AGAINST LANDLORD.

#### 1. Damages Recoverable.

##### (a) Refusing to give Possession.

Action by a tenant against his landlord for refusing to give him possession of the demised premises:—Held, (Wilson, C. J., dissenting), that the proper measure of damages in such a case is the difference between what the tenant agreed to pay for the premises and what they were really worth. But it is not open to the tenant to shew that he rented the premises for the purpose of there carrying on a certain business, of which the landlord was aware, that he could not procure other premises, and to claim the profits which he might have made in such business if he had been let into possession. *Ward v. Smith*, 11 Price 19, not followed; *Jacques v. Millar*, 6 Chy. D. 153, commented upon. *Marrin v. Graver*, 8 O. R. 39.—Q. B. D.

##### (b) For Breach of Covenant in Lease.

In an action by the plaintiff, the lessee of a certain farm, against the defendant, the lessor, for breach of the covenants contained in the lease, to dig ditches, &c.:—Held, *Cameron, C. J.*, dissenting, that the measure of damages was the difference between the rentable value of the

demised premises with the defendant's covenant performed, that is, with the improvements made, and the value without such improvements. At the trial the learned judge directed that if certain improvements were made, the damages were to be reduced thereby. On its being shewn to the Divisional Court that those improvements had substantially been made, the damages were reduced to \$200. *McEwen v. Dillon*, 12 O. R. 411.—C. P. D.

### XI. DISPUTING LANDLORD'S TITLE.

N., respondent, as assignee in insolvency of H., who bought a lot of land from the purchaser at a sheriff's sale for taxes, filed a bill in Chancery under the Ontario Administration of Justice Act against W. & O.N. (appellants), who were in possession, praying inter alia that defendants be ordered to deliver up possession of the lands and to account for the value of trees, &c., cut down and removed. W. by his answer adopted O.N.'s possession and claimed under conveyance from the Crown and impeached the validity of the sale for taxes. O.N. by his answer alleged he was in possession under W. At the trial it was proved that H. gave a lease of the lot to one T. for four years, and that O.N. went to T. while he was still in possession, and by fraudulent representations induced T. to leave the place and thereby obtained possession for the benefit of W. The Court of Chancery for Ontario (29 Chy. 338) held that appellants were obliged to yield up possession to the respondent before asserting any title in themselves. The Court of Appeal for Ontario varied the decree by declaring that the decree was to be without prejudice to any proceeding the appellant W. might be advised to take to establish his title to the lands in question within two months from the date thereof:—Held, per Ritchie, C. J., and Strong, Fournier, and Henry, JJ., affirming the judgment of the courts below,—that the appellants, having gone into possession under T., were estopped in this suit from disputing their landlord's title, and that the respondent was entitled to an injunction to restrain appellants from committing waste and to an account for waste already committed. Per Strong, J.—The decree made by the Chancellor would have constituted no bar to a subsequent action at law or suit in equity by W. to impeach the tax sale, and should not have been varied by the Court of Appeal. Per Gwynne, J.—The case should have been disposed of upon the issue as to the validity of title upon which the plaintiff had by his bill rested his case; and as the appellants had failed to prove that the taxes had been paid before the sheriff's sale, the Ontario statute, 33 Vict. c. 23, had removed all errors and defects, if any there were, which would have enabled the true owner, at the time of the sale, to have avoided it, and pursuant to the provisions of c. 40, sec. 87, R. S. O., the respondent was entitled to recover possession of the land in question and to have execution therefor, but not to an order for an injunction or any direction for an account, the statute authorizing title to real property to be tried in a Court of Chancery not justifying a judgment of a more extensive character than would have been pronounced in a court of common law if the action had been brought there. *White v. Nelles*, 11 S. C. R. 587.

See *Mulholland v. Harman et al.*, 6 O. R. 546, p. 209.

## XII. MISCELLANEOUS CASES.

Right of tenant to redeem mortgage. See *Martin v. Miles*, 5 O. R. 404.

Setting aside lease on grounds of improvidence, compensation for improvements. See *Shanagan v. Shanagan*, 7 O. R. 209.

See *Ambrose v. Fraser et al.*, 12 O. R. 459, p. 311.

## LATERAL SUPPORT.

See *Wray v. Morrison et al.*, 9 O. R. 180, p. 70.

## LEASE.

See LANDLORD AND TENANT.

Mortgage of. See *Kelly v. Imperial Loan & Investment Co. et al.*, 11 A. R. 526, p. 439.

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See WILL.

J. B. being the owner of certain land, by his will, gave his son, M. B., a legacy of \$150 and charged it on the land, which he devised to his son W. B., an infant: with a provision that his son J. B. should occupy it during the minority of W. B., and pay the legacy. The land was so occupied and the legacy paid, and a receipt for its payment taken. W. B. subsequently sold the land to T. B., and T. B. sold it to J. C., who retained \$150 of the purchase money because the legacy was not released; but by an agreement agreed to pay T. B. the \$150 as soon as he should furnish a release duly executed by M. B. The right to receive the \$150 under this agreement and any right he had to obtain this release was assigned by T. B. to M. K. M. K. having tendered a release for execution to T. B., who declined to execute it, brought a suit to compel him so to do:—Held, that although the plaintiff was entitled to a judgment declaring that the legacy was paid, which might be registered, still as the defendant had done no wrong, and had given a receipt for the legacy when it was paid, he was not compellable to sign anything else, and should not be punished by being ordered to pay the costs for not doing that which he was not bound in law to do. The purchaser should not have objected to the title on account of the legacy if there was proof of its being paid. *Kaiser v. Boynton*, 7 O. R. 143.—Boyd.

## LEGISLATIVE ASSEMBLY.

I. POWERS OF—See CONSTITUTIONAL LAW.

II. ELECTIONS TO—See PARLIAMENTARY ELECTIONS.

## LETTERS.

I. OF ADMINISTRATION—See EXECUTORS AND ADMINISTRATORS.

II. CONTRACTS BY—See CONTRACT.

III. ADMISSIBILITY IN EVIDENCE—See EVIDENCE.

IV. DEFAMATORY LETTERS—See DEFAMATION.

V. PATENT.

1. For Lands—See CROWN LANDS.

2. For Invention—See PATENT OF INVENTION.

## LIBEL.

See DEFAMATION.

## LICENSE.

I. LEASE OR LICENSE—See LANDLORD AND TENANT.

II. FOR SALE OF LIQUORS—See INTOXICATING LIQUORS.

III. MUNICIPAL LICENSES—See MUNICIPAL CORPORATIONS.

IV. TIMBER LICENSES—See CROWN LANDS.

## LIEN.

I. WHEN IT EXISTS, 404.

II. EQUITABLE LIENS, 405.

III. MECHANICS' LIENS.

1. Generally, 405.

2. On Mortgaged Property, 407.

IV. MISCELLANEOUS CASES, 408.

V. SOLICITOR'S LIEN—See SOLICITOR.

VI. VENDOR'S LIEN—See SALE OF LAND.

### I. WHEN IT EXISTS.

Held, that the settlement of a claim under a negotiable security without the security being delivered up subjected the defendant to such charges as were a specific lien thereon of which they had notice, or semble, without notice. *Hall v. Griffith et al.*, 5 O. R. 478.—C. P. D.

J. and his wife took rooms in premises kept by defendant, R. A., called the "Shandon House," partly furnishing them, and agreeing to pay \$50 per month for rooms and board. Subsequently, they rented from plaintiff a piano. They left the "Shandon House" in debt for board and lodging to R. A., who thereupon detained the piano, which was claimed by the plaintiff:—Held, that the relation between defendant, R. A., and J. was not that of innkeeper and guest, but of boarding-house keeper and boarder. Held, also, that as the piano was not the property of J. and his wife, that defendant had no lien on it for board and lodging under R. S. O. c. 147. Quære, whether

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the house kept by defendant R. A. was an "inn" within the meaning of R. S. O. c. 147, s. 1. *Newcombe v. Anderson et al.*, 11 O. R. 665.—Q. B. D.

See *Hall v. Collins Bay Rafting and Forwarding Co.*, 12 A. R. 65, p. 59.

## II. EQUITABLE LIENS.

Per Hagarty, C. J.—If "an equitable lien, charge, or interest" be created by deed or by any writing capable of being registered, actual notice of such deed or interest will, under the 67th sec. of the Registry Act, 31 Vict. c. 20 (Ont.), prevent the effect of priority of registration. But as to equitable liens, &c., evidenced by parol only, amongst others a vendor's lien for unpaid purchase money, they have by that Act been prevented from affecting a duly registered title. In the disposition of real property, unless in cases of actual moral fraud, the stringent observance of the Registry Law is the wisest rule to adopt. *Peterkin v. McFarlane*, 9 A. R. 429.

Under a judgment for redemption obtained by an execution creditor of the mortgagor, the mortgagee who held the title under a deed absolute in form, brought into the master's office with his account certain orders, signed by the mortgagor, directing him to pay the parties named in them any surplus moneys in his hands after paying his mortgage. The mortgagee did not accept them, but entered them in his real estate ledger, and they were not registered:—Held, (1) that such mortgagee could not claim to be allowed these orders in addition to his mortgage, not having accepted or paid them; nor could he be looked upon as a trustee holding the lands in trust for the holders of such orders. (2) That the orders operated as equitable charges or liens on the mortgagor's interest in the lands prior to the receipt by the sheriff of the plaintiffs' fi. fa. lands, and that such lien holders should be made parties in the master's office, and prove their claims in their own right. *Canadian Bank of Commerce v. Forbes*, 10 P. R. 442.—Hodgins, *Master in Ordinary*.

## III. MECHANICS' LIENS.

### 1. Generally.

M. having bargained in January with R. & E. to do certain work, and supply certain machinery in their mill, the last of the work being done, and the last of the machinery supplied on the 28th July, filed his lien on the 25th August, and commenced his action 2nd October. On the 24th July, R. & E. had sold and conveyed the mill to P., who, not being aware of this claim, registered his conveyance on 29th July. The lien registered made no mention of P. as "owner," and M. had drawn a draft for part of the money at three months, dated 28th July, which had been accepted by R. & E.:—Held, that M. was entitled to his lien notwithstanding the sale to P. That the omission of P. as owner did not invalidate the lien, and that the drawing of the draft did not operate as a waiver of the lien. *Makins v. Robinson*, 6 O. R. 1.—Ferguson.

W. entered into a contract with M. to do certain carpenter work on buildings for a contract price of \$2,690, which was afterwards, after tak-

ing an account of the extras to and omissions from the contract, increased to \$2,781.85. He proceeded with the contract, and did work to the value of \$2,350, and received on account \$2,125, when he failed and notified W. that he could not proceed with the contract. W. then entered into a contract with C., who was M.'s surety, to finish the work, which he did at an expense of \$525.88. Certain sub-contractors and employees of M. filed liens, and W. moved to have them vacated on the ground that he was entitled to apply the ten per cent. drawback in completing the contract:—Held, reversing in part the order of Proudfoot, J., who dissented, that the amount upon which the ten per cent. drawback was to be calculated was not the whole amount of the contract price, but the amount of the work done by the contractor when he failed and abandoned the work. *Re Cornish*, 6 O. R. 259.—Chy. D.

The plaintiffs contracted with one C. for the execution of the stone work upon certain buildings which C. had contracted to build. C. never completed the work, but during the progress thereof was paid in good faith the full value of the work actually done by him on the building before he abandoned the contract:—Held, reversing the judgment of the County Court, that a sub-contractor with C. could not enforce payment of his claim to the extent of ten per cent. of the contract price under the Act R. S. O. c. 120, s. 11, as amended by 41 Vict. c. 17, s. 1:—*Quere*, as to the meaning and effect of that clause. *Goddard et al. v. Coulson et al.*, 10 A. R. 1.

G. supplied bricks to W., who had leased certain land from H. with an option of purchase. The contract for the supply of the bricks was made between G. and W., and on W.'s credit, although H. was aware that they were being supplied, and that buildings were being erected on the land. These buildings were being erected by W. under a verbal agreement to that effect between W. and H. subsequent to the lease, and by which agreement H. had agreed to lend part of the money required for the buildings to W., advancing the same as the work progressed on the security of the property. W. did not exercise his right of purchase under the lease, and G. filed his lien against both W. and H., and brought this action to establish the same against the interest of both of them:—Held, affirming the decision of Boyd, C., 8 O. R. 478, that the interest of H. in the property was not charged. It requires something more than mere knowledge of the work being done to bind the owner under R. S. O. c. 120, s. 2, sub-s. 3. The privity and assent must be in pursuance of an agreement. H. could in no sense be looked upon as a prior mortgagee and it is only against such that R. S. O. c. 120, s. 7 gives priority to the lien holder. *Graham v. Williams et al.*, 9 O. R. 458.—Chy. D.

Held, following *Breeze v. The Midland R. W. Co.*, 26 Chy. 225 (Proudfoot, J., dissenting), that a mechanic's lien does not attach upon an engine house and turn-table built for a railway company, and confessedly necessary for the proper working of the railway; and that such engine house and turn-table, and the land whereon they are erected, cannot be sold under a proceeding for the purpose of enforcing payment of a mechanic's lien. *King et al. v. Alford et al.*, 9 O. R. 643.—Chy. D.

There is nothing in the Mechanics' Lien Act to indicate that it was intended to be operative to a greater extent than as giving a statutory lien, issuing in process of execution of efficacy equal to, but not greater than, that possessed by the ordinary writs of execution. A mechanic's lien is not analogous to a vendor's lien. Per Proudfoot, J. The Mechanics' Lien Act was intended to place mechanics on a more favorable footing than other creditors, and their right ought not to be measured by what could be realized upon an execution. There seems no distinction in principle between their position and that of an unpaid vendor of land. *Ib.*

The defendant H. contracted with the defendant C. for the building of a house. A clause in the agreement gave H. a right to dismiss C., and employ others to finish the work, in the event of C.'s failure to carry out the contract. H. acting thereunder dismissed C. and agreed verbally with the respective plaintiffs P. & G., who had sub-contracts under C., that if they would proceed with their respective portions of the work, and finish the same, he (H.) would pay them:—Held, affirming the judgment of Boyd, C., 2 O. R. 233, that the agreement with P. & G. was a new and independent contract, not a promise to pay the debt of another, and that P. & G. were entitled to liens for all work done under such agreement with H. as contractors. *Petrie v. Hunter et al.*—*Guest et al. v. Hunter et al.*, 10 A. R. 127.

Where the plaintiff's claim in an action to enforce a mechanic's lien was only \$142, but at the time the action was begun the aggregate amount of the liens (the plaintiff's and another) registered against the property was over \$200:—Held, that the action was properly brought in the High Court of Justice, and the costs should be on the scale of that court, and it made no difference that the other lienholder failed to substantiate his claim. *Hall v. Pitt et al.*, 11 P. R. 449.—Wilson.

## 2. On Mortgaged Property.

The period of 90 days, limited by the 21st section of the Mechanic's Lien Act (R. S. O. c. 120), for the commencement of proceedings to enforce the lien, applies to an action or proceeding against a mortgagee or other person claiming an interest in the lands, and that, whether proceedings have or have not been previously taken against the owner within the 90 days. *Bank of Montreal v. Haffner*, 10 A. R. 592.

The plaintiffs, assignees of a mechanic's lien, brought an action against the owner and a prior mortgagee, but their action was dismissed as against the mortgagee for want of prosecution. Having succeeded in obtaining a judgment establishing their lien against the owner they brought this action after the lapse of more than 90 days from filing their lien, to obtain a declaration of priority over the prior mortgagee to the extent that the work increased the selling value of the land:—Held, reversing the judgment of Ferguson, J., 3 O. R. 183, that the lien had ceased to exist as against the mortgagee. *Ib.*

In an action to enforce a mechanic's lien under R. S. O. c. 120, a reference in the usual form was directed to the local master at Chatham, to

inquire whether any person besides the plaintiffs, other than prior mortgagees, had any incumbrance, &c., upon the premises in question. In proceeding under this reference, the master made a number of persons, including the appellants, parties in his office, and caused them to be served with notice "T," which erroneously recited the judgment as directing an inquiry as to incumbrances generally. The appellants thereupon petitioned to discharge the master's order upon the ground that they were prior mortgagees, and hence not necessary or proper parties to the action. It appeared that the appellants registered their mortgage before any of the work was done or materials supplied for which the plaintiffs claimed, and had advanced the full amount of the mortgage money some months before the plaintiffs' lien was registered, though a portion was advanced after they had commenced work or supplied materials. The mortgagees had no notice of the plaintiff's lien:—Held reversing the judgment of the court below, that the applicant's claim was prior to that of the plaintiffs and that they were not proper parties to the action, being excepted by the terms of the judgment, nor was the master warranted in entering upon any inquiry as to the amount advanced by them subsequent to the commencement of the work. *Richards v. Chamberlain*, 25 Chy. 402, and *Hynes v. Smith*, 27 Chy. 150, referred to. *McVean v. Tiffin*, 13 A. R. 1.

See *Graham v. Williams et al.*, 9 O. R. 458, p. 406.

## IV. MISCELLANEOUS CASES.

Held, that the discretion vested in the trustee to pay off liens on assets did not invalidate an assignment in trust for creditors. See *O'Brien et al. v. Clarkson*, 10 A. R. 603.

See *Grant et al. v. La Banque Nationale*, 9 O. R. 411, p. 43; *McDonald et al. v. McCall et al.*, 12 A. R. 593, p. 294. See also *Eoster v. Russell et al.*, 12 O. R. 136; *Sanderson v. McKercher*, 13 A. R. 561.

## LIFE ASSURANCE.

See INSURANCE.

## LIFE ESTATE.

See ESTATE—WILL.

## LIGHT.

See ELECTRIC LIGHT.

See *Carter v. Grasett*, 11 O. R. 331, p. 209.

## LIMITATION OF ACTIONS.

### I. CLAIM TO REALTY.

1. *Operation of the Statute*, 409.
2. *Nature and Proof of Possession*, 409.

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3. *As against the Crown*, 410.
4. *Lease for Life*, 410.
5. *Dower*, 411.
6. *Right of Way*, 411.
7. *Mortgagor and Mortgager*, 411.
8. *Servant or Caretaker*, 412.
9. *Trustees*, 412.
10. *Continuous Possession*, 413.
11. *Actual and Constructive Possession*, 413.
- II. IN PERSONAL ACTIONS, 414.
- III. JUDGMENTS—See SCIRE FACIAS AND REVIVOR.
- IV. EASEMENTS BY PRESCRIPTION—See WATER AND WATER COURSES.
- V. AGAINST RAILWAYS—See RAILWAYS AND RAILWAY COMPANIES.

#### I. CLAIM TO REALTY.

##### 1. Operation of the Statute.

Held, that the right of compensation for land taken by a railway company is not barred short of twenty years, and is not barred by the claimant's title to the land being extinguished by reason of the railway company having been in possession for ten years. Per *Armour, J.*, the plaintiff's claim to compensation was not money secured by lien, or otherwise charged on land, within s. 23 of R. S. O. c. 108, and he had not a vendor's lien, for the relation of vendor and purchaser never arose between him and the company. *Ross v. Grand Trunk R. W. Co.*, 10 O. R. 447.—Q. B. D.

One G. in 1873 made a conveyance in fee of certain lands. The holder of an unsatisfied judgment for a debt incurred prior to the conveyance, brought this action to have the said conveyance declared voluntary and void as against him. It was pleaded in defence that the right to have the relief asked had become extinguished, for that the Statute of Limitations had rendered the deed of 1873, under which possession was taken, indefeasible by creditors:—Held, that the plaintiff was entitled to the relief asked. A fraudulent deed remains so to the end of time, though it may not be effectively impeachable because of purchasers for value without notice having intervened, or because of the claims of all creditors having been barred or extinguished by lapse of years. *Boyer v. Gaffield*, 11 O. R. 571.—Boyd.

##### 2. Nature and Proof of Possession.

In 1869 L. married G., his deceased wife's sister. G., having had a son by L., died in 1871, seised of certain lands of which L. remained in continuous possession until 1883, the time of action brought:—Held, that L.'s occupation was to be attributed to his rightful character, which was that of tenant by the curtesy, so as not to work tortiously against the heirs at law of the wife. *Re Murray Canal—Lawson v. Powers*, 6 O. R. 685.—Boyd.

Held, affirming the judgment of the Court below, 45 Q. B. 252, that possession for forty years was necessary to establish a title in this case, and that defendants had not shewn posses-

sion for that length of time. *Van Velsor et al. v. Hughson*, 9 A. R. 390.

##### 3. As Against the Crown.

The plaintiff set up that he had a right by prescription to keep and use a boat house in front of his lot on the bank of the Ottawa river without being interfered with:—Held, that any structure on the water even if existing for twenty years, would be an interference with the free use of the river reserved by the Crown and the right to so interfere, could not be acquired by lapse of time. The action was therefore dismissed. *Warin v. The London, &c., Loan and Agency Co.*, 7 O. R. 706, distinguished. *Rath v. Booth et al.*, 10 O. R. 351.—Proudfoot.

##### 4. Lease for Life.

Mrs. H., the owner of lot 13, built a house thereon, but which on a survey made by a surveyor, B., was found to have encroached on lot 12, owned by R., seven and a half inches, whereupon the following agreement was entered into: "It is hereby agreed between R. and Mrs. H. that the line as surveyed between the lots of the above parties on Cherry street by Mrs. B. is correct; but that the said Mrs. H. be permitted to occupy her house during her life, and not be compelled to remove the same, notwithstanding a portion of it is on the land of said R.; but that after the death of the said Mrs. H., said R. may claim the whole of his said lot; and that in the meantime said R. shall occupy his said lot up to the said line in rear of the said house." The defendant had purchased from M. to whom Mrs. H. had sold some 12 years prior to the trial, which took place in the spring of 1886, M. at the time being aware of the agreement, but of which defendant when he bought had no notice. The defendant moved a fence, which plaintiff had erected in rear of the house in accordance with B.'s survey, in a line with the house, and also veneered the house with brick so as to cause it to encroach one and a half inches further on plaintiff's lot. Mrs. H. died within ten years before action commenced, which was brought to recover that part of lot 12 encroached on by defendant:—Held, that the plaintiff was entitled to recover, for that the agreement must be construed as a demise to Mrs. H. for life of that portion of lot 12 covered by the house, and not merely a license to occupy the same, so that the right of entry of the plaintiff, who claimed under R., did not accrue until Mrs. H.'s death, and therefore plaintiff having brought his action within ten years of Mrs. H.'s death, was not barred by the Statute of Limitations. It was objected that the plaintiff must fail under the registry laws, because the grant to Mrs. H. it appeared had not been registered, and defendant bought in ignorance of plaintiff's rights; but:—Held, that the registry laws did not affect the matter, for as defendant bought lot 13 and not 12, the instrument relating to lot 12 would not properly be registered on lot 13:—Held, also, that the agreement signed by Mrs. H. recognizing the line run by B. as the true boundary between the lots, relieved the plaintiff from doing more than shewing where that line ran, and imposed on defendant, who claimed by mesne conveyance

from Mrs. H., the burden of shewing that such line was incorrect. *Per Rose, J.* The plaintiff was clearly entitled to recover as to the one and a half inches; but as to the seven and a half inches, though in doubt, he concurred in the judgment of the court. *Roan v. Kronsheim*, 12 O. R. 197.—C. P. D.

#### 5. Dower.

The owner of land died intestate in 1858, leaving his widow and two infant daughters in possession, all of whom continued to occupy and cultivate the farm until 1883, when the daughters left the premises. In February, 1884, the widow intermarried with J. M. No proceeding had meanwhile been taken or claim made by the widow to have dower assigned to her. In an action brought by the daughters against J. M. and his wife, to recover possession thereof, the mother claimed she was entitled to retain possession of the premises in respect of her dower, but:—Held, that the right to dower was barred by 38 Vict. c. 10, s. 14, (Ont.), which requires proceedings to be taken to enforce a widow's dower within ten years from the death of her husband. *MacDonald v. McKee*, 13 A. R. 121.

#### 6. Right of Way.

See *Maughan v. Casci*, 5 O. R. 518.

#### 7. Mortgagee and Mortgagee.

Held, affirming the judgment of the Chancery Division (1 O. R. 167), *Spragge, C. J. O.*, diss., that an assignment under the Insolvent Act, 1875, by an insolvent mortgagor does not stop the running of the Statute of Limitations so as to keep alive the claim of the mortgagee against the land. *Court v. Watsh*, 9 A. R. 294.

In a foreclosure suit against the heirs of a deceased mortgagor, who were all infants, a decree was made ordering a sale; the lands were sold pursuant to the decree and purchased by J. H., acting for and in collusion with the mortgagee; J. H., immediately after receiving his deed, conveyed to the mortgagee, who thereupon took possession of the lands and thenceforth dealt with them as the absolute owner thereof; by subsequent devises and conveyances the lands became vested in the defendant M. H., who sold them to L., one of the defendants to the suit, a bona fide purchaser without notice, taking a mortgage for the purchase money. In a suit to redeem the said lands brought by the heirs of the mortgagor some eighteen years after the sale and more than five years after some of the heirs had become of age:—Held, reversing the judgment of the Court of Appeal, 9 A. R. 537, that the suit being one impeaching a purchase by a trustee for sale the Statute of Limitations had no application, and that, as the defendants and those under whom they claimed had never been in possession in the character of mortgagees, the plaintiffs were not barred by the provisions of R. S. O. c. 108, s. 19, and that the plaintiffs were consequently entitled to a lien upon the mortgage for purchase money given by L. Held, also, that as it appeared that the plaintiffs were not aware of the fraudulent character of the sale until just before commencing

their suit, they could not be said to acquiesce in the possession of the defendants. *Faulds v. Harper*, 11 S. C. R. 639.

*Per Burton, J. A.*—An action to redeem a mortgage is not an action to recover land, within the meaning of the Real Property Limitation Act. S. C., 9 A. R. 537.

Held, that an action on a covenant in a mortgage for payment of the mortgage money, does come within R. S. O. c. 108, s. 23 limiting suits for the purposes therein mentioned to ten years. *Allan v. McTavish*, 2 A. R. 278, followed in preference to *Sutton v. Sutton*, 22 Ch. D. 511, and *Fearnside v. Flint*, ib. 579. *McDonald v. Elliott*, 12 O. R. 98.—Rose.

The rule that the only person whose payment on account will prevent foreclosure from being barred is the mortgagor, or his privy in estate, or the agent of either of them must be qualified so as to include any person who by the terms of the mortgage contract is entitled to make payments. Where H. and W. each mortgaged some property to the obligee of their joint and several bond, to secure the amount of the obligation, the latter as between the debtors being security only, H. being bound to pay principal and interest, and expressly named as a person entitled to redeem both mortgages, W. never having made any payment at all:—Held, in a suit for foreclosure, that the period of limitation prescribed by sec. 30 of c. 84, of the Consolidated Statutes of New Brunswick ran in respect of both mortgages from the date of the last payment of interest by H. Judgment of Supreme Court, 9 S. C. R. 637, reversed. *Lewin et al. v. Wilson et al.*, 11 App. Cas. 639.

#### 8. Servant or Caretaker.

See *Hickey et al. v. Stover et al.*, 11 O. R. 106.

#### 9. Trustees.

J. by his will devised to H., his wife, all his real estate in L. "during her natural life, for the use and support of herself and family, and in case H. should at any time think proper to sell my said estate, it shall be the duty of my executors to sell the same with her consent, and the proceeds thereof to be distributed as follows," &c: "But if H. should not think proper to sell my said estate, then the same shall be divided amongst my children, their heirs and assigns, after the death of H., share and share alike." He then nominated P. executor of his will, "with full power and authority to act in the same." J. died in 1838, leaving H. and three children him surviving. P. took out probate. In 1846, H. by deed conveyed her estate in the lands for £150 to P. Under this deed P. obtained possession, which he retained till his death in 1882, when he devised the land to K. in trust for the purposes of his will, of which he made K. executor. H. died in 1872, and this action was commenced in 1883, by one of J.'s children, claiming an account against K. of the profits of the lands, and to have the same sold, and the proceeds distributed according to J.'s will:—Held, affirming the decision of Osler, J. A., that P. could not be said to have been an express trustee within R. S. O. c. 108, s. 30, and that

being so, the Statute of O. R. 193.

Held, that the Surrogate thereby by majority against him the guardian T. L.'s minority with the last 22 years, a possession F. L., having had been in his tenant, ground that had been in Proudfoot, city of T. L. for his bene constructive t Hickey et al. Chy. D.

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being so, the plaintiff's action was barred by the Statute of Limitations. *Johnson v. Kræmer*, 8 O. R. 193.—Chy. D.

Held, that J. L. having been appointed by the Surrogate Court, guardian of her son, T. L., she thereby became an express trustee during his minority, so that she could not acquire title against him by possession of his lands, yet that the guardianship ended and the trust ceased with T. L.'s minority, and as after that J. L. dealt with the land in question as her own for some 22 years, she had acquired a good title to it by possession as against T. L.:—Held, also, that T. L., having in his pleadings set up that J. L. had been in possession for the said 22 years as his tenant, could not obtain a new trial on the ground that he could shew by evidence that she had been in as caretaker for him. *Semble*, per Proudfoot, J., that if J. L. had, after the minority of T. L., continued to manage the property for his benefit, she would then have been a constructive trustee for him, not an express one. *Hickey et al. v. Stover et al.*, 11 O. R. 106.—Chy. D.

See *Faulds v. Harper*, 11 S. C. R. 639, p. 412.

#### 10. Continuous Possession.

The possession of the defendant in this case was not of the continuous and exclusive character necessary to maintain a title under the statute. See *Donovan v. Herbert*, 12 A. R. 298.

In 1868 B. being the owner and occupant of the east half of lot one in the village of Oil Springs, took possession of the garden, &c., on the west half of such lot on which there was a dwelling house occupied by a tenant, and enclosed the land by a fence with his own lot; and in 1872 the house having been deserted by the tenant or occupant took possession of that also, repaired it and used it as a workshop. In the same year A. who was at one time the owner of such west half removed the doors and windows of the dwelling and never afterwards returned to the premises. Thenceforward B. remained in undisturbed possession of the house and land, repairing and cultivating the same, and also paying the taxes levied thereon until in October, 1884, he sold the property to the defendant:—Held, that B. by virtue of such possession and through B.'s conveyance to him, the defendant, had acquired a good title under the Real Property Limitation Act. *Seale v. Johnston*, 13 A. R. 349.

#### 11. Actual and Constructive Possession.

The plaintiff and M., his next adjoining neighbour, in 1863, employed a surveyor to run the line between his land and that of M. The line drawn ran through a wood. For more than ten years the plaintiff was in the habit of cutting timber up to the said line, and he and the owners of the adjoining land recognized it as the division line:—Held, that this was sufficient occupation by the plaintiff to give him a good title by possession up to the said line, whether it was the correct line or not. *Harris v. Mudie*, 7 A. R. 414, distinguished. *McGregor v. Keiller et al.*, 9 O. R. 677.—Proudfoot.

In 1811 P. the owner of certain land, sold it to D. who went into possession and occupied till 1827 or 1828, when he was turned out by the sheriff under legal proceedings, the nature of which did not appear, taken by Dufait, who was put in possession, and remained in possession until 1864, when he conveyed to O. through whom the plaintiff claimed. D.'s actual possession had been only of about ten acres:—Held, that D.'s possession was of the whole land; and that he could not be treated as a squatter so as to enable him only to acquire a title to the ten acres actually occupied. It was objected by the plaintiff that the evidence of the recovery by legal proceedings was inadmissible, because no judgment was proved; and not being proved was no evidence against the plaintiff; but—Held, that though this might be so if the plaintiff's title were being inquired into, it was admissible for the defendant in respect of his possessory title. *Robertson v. Daley*, 11 O. R. 352.—C. P. D.

See *Cain v. Junkin*, 6 O. R. 532, 13 A. R. 525, p. 178.

#### II. IN PERSONAL ACTIONS.

To an action on a foreign judgment recovered in the Supreme Court in New York, the defendant set up as a defence that the cause of action accrued more than six years before the commencement thereof:—Held, on demurrer, a good defence, for under our law the foreign judgment is only deemed to constitute a simple contract debt, and the period of limitation is governed by the *lex fori*, and not by the *lex loci contractus*. *North v. Fisher*, 6 O. R. 206.—Rose.

To make a part payment take a debt out of the bar raised by the Statute of Limitations, it is sufficient if the payment be made in respect of a larger debt which is the one sued on. The payment of part is an act from which the inference may be drawn that the debtor intended to pay the balance though no special reference is made thereto at the time of such part payment. *Boulton v. Burke*, 9 O. R. 80.—C. P. D.

In an action to recover the balance of an alleged debt to which the statute was pleaded as a bar, the debt was proved as also that several payments were made by the defendants thereon:—Held, that an implied promise to pay the balance might be inferred; and therefore the statute did not apply. *Id.*

Though the remedy of a creditor to recover a debt be barred by the Statute of Limitations, he may hold the collateral securities for such debt until paid. Where no claim for arrears of interest is specially made by the pleadings, and where there is no covenant to pay interest, only six years' arrears can be recovered. *Wiley v. Ledgerd*, 10 P. R. 182.—Hodgins, *Master in Ordinary*.

One of two executors and co-residuary legatees got in portions of the residuary estate, and as to such his estate was held liable as for a legacy to the other residuary legatee, 19 C. L. J. 95. Some of the moneys so got in were reinvested, and afterwards came again into the hands of such co-residuary legatee in administering the estate:—Held, as to the latter moneys, the relationship of debtor and creditor applied, but that by reason of the Statute of Limitations the ac-

count could not extend further back than six years. Some of the residuary estate consisted of lands, which the co-residuary legatee as tenant in common occupied, or got in the rent and profits of:—Held, (1) that the account extended only to whatever had been paid or given by tenants or occupants of the joint property more than the co-tenants just share or proportion. (2) That such co-tenant was not liable for the profits or produce taken by him from the common property, nor for his enjoyment of such property when there was no exclusion or ouster. (3) That the six years' bar of the Statute of Limitations applied to such claim. *Re Kirkpatrick—Kirkpatrick v. Sterenson*, 10 P. R. 4.—Hodgins, *Master in Ordinary*.

In an action for breach of promise of marriage, the plaintiff stated that the defendant promised to marry her in the fall of 1873, but when that time had arrived he excused his doing so, because he said he had not his house built, and he agreed not to marry until he had a suitable house. The plaintiff told him she was willing to live in a shanty, and he said he would not marry until he could keep plaintiff. The house was built in the summer of 1878. No definite promise was proved after the fall of 1873, but the plaintiff and defendant kept up friendly relations until 1884, when the defendant married another woman, and this action was brought. At the trial it was objected that there was no evidence to corroborate the plaintiff's evidence as to the alleged promise, and that the action was barred by the Statute of Limitations. The learned judge overruled the objection, and left the case to the jury. Held, per Cameron, C. J., and Rose, J., that the action was barred by the Statute of Limitations. *Costello v. Hunter*, 12 O. R. 333—C. P. D.

Condition in a fire insurance policy that any action thereon should be barred "unless commenced within the term of six months next after the loss or damage shall have occurred." See *Peoria Sugar Refining Co. v. Canada Fire Ins. Co.*, 12 A. R. 418.

Held, that a decree in an administration suit, although it may enure to the benefit of all creditors of an estate, does not prevent the Statute of Limitations from running against debtors to the estate. *Archer et al. v. Severn et al.*, 12 O. R. 615.—Proudfoot.

See *McDonald v. Elliott*, 12 O. R. 98, p. 412; *Simpson v. Corbett*, 5 O. R. 377, p. 261. See also *St. John v. Rykert*, 10 S. C. R. 278.

#### LIQUIDATED DAMAGES.

See PENALTY BY CONTRACT.

#### LIQUIDATORS.

UNDER WINDING-UP ACTS—See CORPORATIONS.

#### LIQUOR.

See INTOXICATING LIQUORS.

#### LIS PENDENS.

A lis pendens should not be vacated unless it appears from the endorsement on the writ or the pleadings that the claim upon the land is not an appropriate remedy. There should be clear and almost demonstrative proof that the writ is an abuse of the process of the court. *Jameson v. Lang*, 7 P. R. 404, approved of. *Sheppard v. Kennedy*, 10 P. R. 242.—Boyd.

When a plaintiff seeks to register a lis pendens he should be more precise in respect to the endorsement on his writ than in ordinary cases, and should define generally the grounds of his claiming an interest in the lands. *Ib.*

Action by a creditor of M. to set aside a conveyance by M. to his wife, as fraudulent:—If a proper case in which to register a certifier lis pendens, and that pending the action no writ could be made to vacate it. *Foster v. Moore et al.*, 11 P. R. 447.—Ferguson.

See also *McTaggart v. Tootle et al.*, 10 P. R. 261.

#### LIVERY STABLES.

See MUNICIPAL CORPORATIONS.

#### LOCAL JUDGE OF HIGH COURT.

See PRACTICE.

#### LOCAL MASTER.

See PRACTICE.

#### LORD'S DAY.

See SUNDAY.

#### LOST DOCUMENTS.

See EVIDENCE.

#### LOTTERY.

See GAMING.

#### LUGGAGE.

See BAGGAGE.

#### LUNATIC.

A petition was presented by the husband of D. to declare his wife a lunatic, which was opposed by her. Pending the hearing of the petition D. assigned her separate estate for the benefit of her creditors. The court dismissed the petition. D.'s solicitor presented a petition for taxation of D.'s costs, and for payment by the assignee in

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priority to the claims of the creditors,—*Held*, that the costs of opposing the petition might be classed as necessities which the wife is liable to pay out of her separate estate, and for which that estate is liable in the hands of her assignee, but that they could not be put on the footing of maintenance. Such costs should be paid ratably out of the assets, and costs subsequent to the assignment should not rank in competition with creditors before the assignment. *Re Dumbrell*, 10 P. R. 216.—*Boyd*.

Money in court to the credit of a lunatic though not so found was directed to be paid out in annual sums for maintenance. *Re Hinds*, *Hinds v. Hinds*, 11 P. R. 5.—*Ferguson*.

#### MACHINERY.

*See* FIXTURES.

#### MAGISTRATES.

*See* JUSTICES OF THE PEACE.

#### MAINTENANCE.

I. OF INFANTS—*See* INFANT—WILL.

II. OF LUNATICS—*See* LUNATIC.

III. OF SONS—*See* CHAMPERTY.

IV. OF WIFE—*See* HUSBAND AND WIFE—WILL.

Deed subject to condition of maintenance. *See* *Millette v. Sabourin*, 12 O. R. 248.

#### MALICIOUS ARREST, PROSECUTION AND OTHER PROCEEDINGS.

I. MALICIOUS ARREST, 417.

II. MALICIOUS PROSECUTION, 418.

III. OTHER PROCEEDINGS, 419.

IV. ACTIONS AGAINST MAGISTRATES—*See* JUSTICES OF THE PEACE.

##### I. MALICIOUS ARREST.

In an action for malicious arrest the jury found a general verdict for the plaintiff, with \$200 damages. They also specially found, in answer to a question put to them, "that the defendant honestly believed that his duty as constable called upon him to make the arrest." The learned judge thereupon entered a nonsuit, holding that the defendant should have received notice of action. The general issue by statute R. S. O. c. 73, was not pleaded, and the statement of defence was not framed so as to enable the defendant to avail himself of it; and the court were of opinion under the facts, set out in the report, that there was no evidence on which the special finding of the jury could be supported:—*Held*, that the nonsuit must be set aside, and judgment

entered for the plaintiff, with \$200 damages as assessed. If the statute has not been pleaded honest belief is no defence, if there existed no reasonable ground for such belief. *McKay v. Cummings*, 6 O. R. 400.—*C. P. D.*

In an action for malicious arrest the statement of defence set up that there was a warrant in the hands of a constable for the apprehension of the plaintiff on a charge of misdemeanour; that the plaintiff was avoiding arrest; that the defendants therefore watched him and when he endeavoured to escape detained him until the arrival of the constable, and then gave him into custody; and that the defendants did this in the bona fide belief that they were justified in thus aiding the arrest:—*Held*, that although these facts did not constitute an answer to the action, yet they could be given in evidence in mitigation of damages, and therefore it was proper that they should appear upon the record. *Purday v. Bennett et al.*, 11 P. R. 64.—*Rose*.

*See* *Richardson v. Ransom*, 10 O. R. 387, *infra*; *Scougall v. Stapleton*, 12 O. R. 206, p. 419.

##### II. MALICIOUS PROSECUTION.

Action for malicious prosecution and slander. The malicious prosecution arose out of a charge before a magistrate and a subsequent indictment preferred at the Quarter Sessions. In proof of the termination of the criminal proceedings, the plaintiff produced in evidence, which was admitted subject to objection, the original indictment endorsed "no bill":—*Held*, that this was not sufficient, but that a record should have been regularly drawn up and an examined copy produced:—*Held*, also, that evidence of the motives which induced the defendant to lay the charge before the magistrate was properly receivable, and should not have been rejected as was done here. *McCann v. Preneveau*, 10 O. R. 573.—*C. P. D.*

In an action for falsely and maliciously charging the plaintiff with obtaining money from the defendant by false pretences, and for arresting and prosecuting him therefor before the police magistrate of Belleville, appointed by the Government of the Province of Ontario, and who, it was alleged, had no jurisdiction to act, it being contended that such appointment properly lay with the Dominion Government:—*Held*, that a person could not be considered a trespasser merely by laying an information before a police magistrate so appointed, charging another with a crime, and praying therein that a warrant might be issued for his arrest. *Richardson v. Ransom*, 10 O. R. 387.—*Q. B. D.*

A robbery having been committed at the defendant's store a bill of an account due by the plaintiff to the defendant, which it was alleged had been rendered some time previously, was found lying near by, which from its crumpled appearance indicated that it had been carried about for some time in a person's pocket. From this the defendant said he suspected some one in the plaintiff's house, and he went to a magistrate and laid an information, upon which a search warrant was issued, and the plaintiff's house searched, but none of the stolen goods were found therein and no arrest was made. It appeared that the account which was found had

never been sent to the plaintiff but a similar one had, the defendant stating that when he caused the search warrant to be issued, he was under the belief that the account had been sent, having forgotten the fact that it had not been. In an action for malicious prosecution, the learned judge entered a verdict for the defendant, holding that the plaintiff had failed to show that the defendant acted without reasonable and probable cause:—Held, there must be a new trial; that it should have been submitted to the jury to say: 1. Whether the account was sent to the plaintiff; 2. Was it found as alleged; 3. If not sent, did the defendant believe it had been so sent; and, 4. If defendant did so believe, were the circumstances such as to warrant a reasonable man of ordinary prudence to form such belief; and, per Rose, J., it might be necessary also to submit to the jury the question, whether it was a prudent and reasonable thing for the defendant to rely on his memory. *Young v. Nichol*, 9 O. R. 347, C. P. D.

Held, also, that an action for malicious prosecution will lie for issuing a search warrant without reasonable and probable cause. *Abrath v. North Eastern R. W. Co.*, 11 Q. B. D. 79, 440, commented on. *Ib.*

In an action for malicious prosecution, it appeared that the plaintiff's father sold a buggy to B. for \$115, to be made in two payments of \$55 and \$57 respectively, and until paid the title and right of property were to remain in the vendor. Before the purchase money was paid B. sold the buggy to defendant, a livery stable keeper. The plaintiff's father, on hearing of this, directed the plaintiff to go and take it from defendant, which he did, informing those at defendant's place that plaintiff could be seen at an hotel named. The defendant, on his return, went and saw the plaintiff, who told him he was acting under instructions from his father, who claimed to be the owner of the buggy, but, notwithstanding, the defendant caused the plaintiff to be arrested for larceny, and he was committed for trial, and was subsequently tried and acquitted. The jury found for the plaintiff:—Held, on the evidence, the verdict could not be interfered with. *Scougal v. Stapleton*, 12 O. R. 206.—C. P. D.

The defendant set up that before causing the arrest he consulted a lawyer, but the jury found that the plaintiff did not give a full and true account of the case:—Held, that this ground failed. *Ib.*

Evidence was offered that the magistrate, against whom there was no charge, had, before acting, consulted the county attorney, which was rejected:—Held, that the rejection was proper. *Ib.*

### III. OTHER PROCEEDINGS.

The defendant having recovered a judgment against the plaintiff in the Division Court at Toronto, a transcript was ordered to be sent to another Division Court at Unionville, but by some mistake in the Division Court office it was not sent until after the debt had been paid, and the clerk of the Toronto court endorsed on it a direction to the clerk of the other court to issue execution and remit the money to him when

made. The plaintiff's goods having been seized under this execution, he sued the defendant for having wrongfully and maliciously and without reasonable or probable cause caused the same to be issued and the plaintiff's goods to be seized thereunder. The defendant had never interfered or given any directions beyond instructing the suit to be brought:—Held, that the plaintiff could not recover; that it was his duty to protect himself by seeing that the clerk of the Division Court was notified of payment of the debt, and there was therefore no malfeasance or omission on defendant's part:—Held, also, that the defendant was not liable in trespass, for he had not authorized the direction by the clerk to issue execution, which was no part of the clerk's duty; and—Semble, that neither could he have been responsible if his attorney had directed it, after the suit had been settled. *Tuckett v. Eaton*, 6 O. R. 486.—C. P. D.

Quere, under R. S. O. c. 47, s. 160, whether a person whose goods have been seized under Division Court process, can have any further relief than the restoration of his goods:—Held, that the damages given were, under the facts set out in the report, grossly excessive. *Ib.*

### MALICIOUS INJURY TO PROPERTY.

See *Regina v. McDonald*, 12 O. R. 381, p. 382.

### MALPRACTICE.

See MEDICAL PRACTITIONERS.

### MANDAMUS.

#### I. WHERE IT LIES.

1. *Where there is another Remedy*, 420.
2. *To County Court Judges*, 420.
3. *To Municipal Corporations*, 421.
4. *To Other Persons*, 422.

#### II. ENFORCING, 423.

#### I. WHERE IT LIES.

1. *Where there is Another Remedy*.

See *In re The Corporations of the Township of Moulton and Canborough, and the Corporation of the County of Haldimand*, 12 A. R. 503, p. 421. See also *Quindan et al. v. The Canada Southern R. W. Co. et al.*, 6 O. R. 567.

2. *To County Court Judges*.

Mandamus to County Court Judge to try an appeal from the Court of Revision. See *In re Allan*, 10 O. R. 110.—Wilson.

On appeal the judgment of Rose, J. (9 O. R. 154), that a County Court Judge will not be compelled by mandamus to inquire on a scrutiny of ballot papers under sections 61, 62, and 63 of the Canada Temperance Act of 1878, as to per-

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#### PROPERTY.

R. 381, p. 382.

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sonation, bribery or the status on the voters' list of the parties voting, was affirmed by this court, it appearing that the point was covered by a judgment of the Supreme Court of Canada in *Chapman v. Rand*, in which the judgment appealed from in this case was cited and approved of. *Re Canada Temperance Act*, 12 A. R. 677.

### 3. To Municipal Corporations.

Where a municipal corporation issued debentures under authority of certain by-laws which required a sinking fund to be raised each year to provide for payment of the principal at maturity, but the corporation omitted to raise such sinking fund:—Held, that they should be compelled by mandamus, on the application of a debenture holder, to raise the sinking fund for the current years, and that proceedings were properly taken against the corporation, and not the clerk of the municipality, notwithstanding R. S. O. c. 180, sec. 88. For that enactment must be taken in connection with 46 Vict. c. 18, s. 359, and the clerk is not to insert in the collector's roll any sums which the council has not directed to be levied. Held, however, that the mandamus could not include the levy of the rate for a sinking fund in future years, nor semble the levy of arrears. The not levying a rate for the sinking fund is an annual breach of duty, and upon any breach a right arises to have it corrected. *Clark v. Corporation of Palmerston*, 6 O. R. 616.—Proudfoot.

It is discretionary with and not obligatory upon a municipal council to open a road allowance, and the fact that a by-law has been passed does not create such an obligation, and a mandamus was refused. *Re Wilson v. Wainglet*, 10 P. R. 147.—Rose.

An appeal from the judgment of Rose, J., (not reported) dismissing an application under 46 Vict. c. 18, s. 535, (Ont.) for a mandamus to compel the repair by the county of Haldimand of an existing bridge or the construction of a new one over the Oswego Creek, where it crosses the boundary line between the townships of Moulton and Haldimand, by reason of the judges of this court being divided in opinion, was dismissed:—Per Hagarty, C. J. O., and Osler, J. A.—Indictment was the appropriate remedy. The court below had the right to grant the writ in its discretion, which was, however, properly exercised in refusing it:—Per Burton and Patterson, JJ. A.—The duty under the statute is not the general obligation to keep highways and bridges in repair, but is a specific duty like that cast upon railway companies by their charters with respect to the restoration of roads or the building of bridges. The existence of liability to indictment does not of necessity exempt from compulsion by mandamus any party charged by statute with a specific duty. Indictment would in this case be neither a specific nor an adequate remedy, and a mandamus should have been granted. The demand made upon the county council previous to the application was sufficient:—Per Osler, J. A.—The demand was insufficient:—Per Curiam.—The county council were liable for the non-repair of the bridge in question. *In re The Corporations of the Townships of Moulton and Canborough and The Corporation of the County of Haldimand*, 12 A. R. 503.

Held, that an action claiming a mandamus will lie against a municipality for not opening an original allowance for road, by reason of which the occupant of land cannot have access to and from his land, to and from a public road, if there be no other convenient way to and from his land, and if there be no good reason, in respect of means or otherwise, why such allowance should not be opened, and if the work required to be done for that purpose be worth the outlay required to open and maintain the same:—Semble, if the evidence given will not warrant the court in granting a mandamus upon motion to the court, and the court has before it all the materials necessary for finally determining the question in dispute, judgment may be given for the defendants under Rule 321 of the Judicature Act. *Hislop v. The Township of McGillivray*, 12 O. R. 749—Q. B. D.

A mandamus was applied for at the instance of the sessions for the County of Halifax, to compel the warden and council of the town of Dartmouth to assess, on the property of the town liable for assessment, the sum of \$16,976 for its proportion of county school rates for the years 1873-78, under sec. 52 of the Educational Act, R. S. N. S. c. 38. The Supreme Court of Nova Scotia, without determining whether the required assessment was possible and was obligatory when the writ was issued, made the rule nisi for a mandamus absolute, leaving these questions to be determined on the return of the writ. On appeal to the Supreme Court of Canada, it was—Held, (Strong and Gwynne, JJ., dissenting,) that the granting of the writ in this case was in the discretion of the court below, and the exercise of that discretion cannot at present be questioned:—Per Ritchie, C. J.—That the town of Dartmouth is not, but that the city of Halifax is, exempted by c. 32, R. S. N. S. from contribution to the county school rates. *Regina v. Warden and Council of the Town of Dartmouth*, 9 S. C. R. 509.

### 4. To Other Persons.

The owner of land taken by a railway is entitled to compensation, and the company must proceed to settle the amount thereof under R. S. O. c. 165, s. 20, if they do not, the proper course is to apply for a mandamus. *Demorest v. The Midland R. W. Co. of Canada*, 10 P. R. 73.—Cameron.

On such application a formal title in the absence of proof to the contrary need not be proved, it is sufficient if the applicant swear that he is the owner of the land taken. *Ib.*

Notice of motion was addressed to the Midland Railway Company, and the Grand Junction Railway Company, and to the Presidents and Directors of each, and asked for relief against all or either:—Held, that sec. 17 of R. S. O. c. 52, contemplates the calling upon any party who may be affected by the writ if issued to shew cause why it should not issue, and therefore the notice was not objectionable as being in the alternative. *Ib.*

To School Trustees to admit pupils. See *Dunn v. Board of Education of Windsor*, 6 O. R. 125; *In re Minister of Education and McIntyre v. The Public School Trustees of Section 8, in the Township of Blanchard et al.*, 11 O. R. 439.

Held that mandamus to the Provincial Secretary is the proper mode for enforcing the issue of a notice under 27-28 Vict. c. 23, s. 5, sub-s. 18 (Can.) stating that a by-law increasing the capital stock of a company had been passed, and declaring the number and amount of shares of the new stock, &c. See *Le Massey Manufacturing Co.*, 11 O. R. 444; 13 A. R. 446. But see 49 Vict. c. 16, s. 32.

To compel revising officer to hold a sittings and adjudicate upon a complaint to have a name struck off the voters' list. See *Sinmons and Dalton*, 12 O. R. 505.

See also *Regina v. Richardson*, 8 O. R. 651.

## II. ENFORCING.

Attachment not sequestration is the proper remedy for disobeying a mandamus. *Demorest v. Midland Railway Company*, 10 P. R. 82.—Wilson.

A writ of mandamus was directed to the Midland Railway Company, and was served on the president. Attachment against the president for disobedience of the writ was refused, because it appeared that he could not by himself and without a majority of the board of directors perform the act required by the writ, and the other directors had not been served: but—Held that the mandamus was properly directed to the company. *Ib.*

## MANUFACTORIES.

EXEMPTION FROM TAXATION—See MUNICIPAL CORPORATIONS.

## MARINE INSURANCE.

See INSURANCE.

## MARKETS.

See MUNICIPAL CORPORATIONS.

## MARRIAGE.

See HUSBAND AND WIFE.

## MARRIAGE SETTLEMENT.

See HUSBAND AND WIFE—FRAUDULENT CONVEYANCES.

## MARRIED WOMEN.

See HUSBAND AND WIFE.

## MARSHALLING ASSETS.

There can be no marshalling of assets in favour of a charity. *Becher v. Hoare et al.*, 8 O. R. 328.—Ferguson.

## MASTERS OF THE COURT.

See PRACTICE.

## MASTER AND SERVANT.

### I. CONTRACT OF HIRING.

1. *Between Relations*, 424.
2. *Remuneration or Salary*, 424.
3. *Determination of*, 424.

### II. ACTION FOR WRONGFUL DISMISSAL, 424.

### III. LIABILITY OF MASTER FOR INJURY TO SERVANT IN COURSE OF EMPLOYMENT, 425.

#### CONTRACT OF HIRING.

##### 1. *Between Relations*.

Where brothers, or sisters, or other near relatives, live together as a family, no promise arises by implication to pay for the services rendered or benefits which, as between strangers, would afford evidence of such a promise; and therefore in an action between relatives so living together for board, wages, or the like, an express promise must be proved by the party making the claim. *Redmond v. Redmond*, 27 Q. B. 220, followed and approved of. *Iler v. Iler*, 9 O. R. 551.—C. P. D.

##### 2. *Remuneration or Salary*.

Where by-law of a municipality appointed a health officer but did not fix his salary:—Held, that the law would fix his salary at a reasonable sum, regard being had to the services performed. *Bohart v. The Corporation of the Township of Seymour*, 10 O. R. 322.—Ferguson.

##### 3. *Determination of*.

Held, that a contract of hiring entered into with a firm by a commercial traveller is put an end to by the death of one of the partners. *Burnet v. Hope et al.*, 9 O. R. 10.—C. P. D.

The plaintiff, who sued for wrongful dismissal, having received a letter from the firm in March, 1882, dispensing with his services from the 1st January, 1883, afterwards signed a receipt for his wages for December, adding, "and I am now leaving their employment:—"—Held, that this was evidence for the jury of acquiescence in the termination of his engagement, more especially as he had made no claim for future wages. *Ib.*

### II. ACTION FOR WRONGFUL DISMISSAL.

This action was brought by G. against A. F. S. S. Co. to recover damages for an alleged breach of contract. The plaintiff was master of the ss. *George Shattuck*, trading between Halifax and St. Pierre and other points in the Dominion. She was owned by defendant company, the plaintiff being one of the largest shareholders of the company. Plaintiff's contract was that he was to supply the ship with men and provisions for the passengers and crew, and sail her as commander for \$900 a month, afterwards increased



to \$950. The ship had been originally accustomed to remain at St. Pierre 48 hours, but the time was afterwards lengthened to 60 hours by the company, yet the plaintiff insisted on remaining only 48 hours, against the express directions of the company's agents at St. Pierre, and was otherwise disobedient to the agents, in consequence of which he was, on the 22nd May, without prior notice, dismissed from the service of the company. The case was tried before Sir William Young, C. J., without a jury, who, considering that the plaintiff was not a master in the ordinary sense, held that he had been wrongfully dismissed and found a verdict in his favour for \$2,000. A rule nisi was made absolute by the full court for a new trial. On appeal to the Supreme Court of Canada it was—Held, 1st. That even if the dismissal had been wrongful, the damages were excessive, and the case should go back for a new trial on this ground. 2nd. Per Ritchie, C. J., and Fournier and Gwynne, JJ., That the fact of the master being a shareholder in the corporation owning the vessel had no bearing on the case, and that it was proper to grant a new trial to have the question as to whether the plaintiff so acted as to justify his dismissal by the owners submitted to a jury, or a judge, if case be tried without a jury. *Gulford v. Anglo French S. S. Company*, 9 S.C. R. 303.

See *Burnet v. Hope et al.*, 9 O. R. 10, p. 424.

### III. LIABILITY OF MASTER FOR INJURY TO SERVANT IN COURSE OF EMPLOYMENT.

The statement of claim alleged that the plaintiff was employed by the defendants to work at track laying: that while so employed the defendants directed and required him to assist in bringing railway supplies to the place where they were being used: that they also directed and required him to be carried, as part of his employment, on the defendants' trains: that accordingly he was received by the defendants "to be safely carried" on a train, and that owing to the defendants' negligence he was, while so travelling, thrown off the train and injured:—Held, 1. That if the plaintiff accepted a different employment from that originally contemplated, he became the defendants' workman in that new employment, just as he had been in his former employment. 2. That the statement that the plaintiff was received on the train "to be safely carried" did not imply that a special bargain was made "to safely carry," but only that the plaintiff was to be safely carried as one of their workmen in the course of his employment; and that there was no cause of action. *May v. Ontario and Quebec R. W. Co.*, 10 O. R. 70.—Wilson.

Held, in an action by a servant against his master for an injury he had sustained, in consequence of the guard being out of place in working a circular saw which he had to attend, that it was not sufficient to shew that the master knew the saw was not guarded; but it must also appear that the servant was ignorant of that fact, and as the servant was skilled in the use of the saw, and did not look to see whether the guard was on or off, as it was his duty to have done, he could not, therefore, make the master responsible to him for the consequences of his

own neglect of duty. *Miller v. Reid*, 10 O. R. 419—Q. B. D.

The defendants, the proprietors of extensive mills, constructed a tramway to carry lumber from one end of their yard to the other, the cars used being drawn by a steam engine. There was no passenger car, but the employees were permitted to be carried on the road. The track was laid on ties placed on wet ground, very little ballasting was done, and none where the accident happened, and there was other evidence of faulty construction. The plaintiff was going to his work on one of the cars, when it was thrown off the track by reason of a misplaced rail, caused by the defective construction. The defendants employed a competent foreman, who delegated the duty of keeping the track in repair to one B., a fellow servant of the plaintiff, and it was shewn that B. neglected to replace the rail, though he was aware of its being displaced:—Held, that the accident having been caused by the negligence of a fellow servant, the defendants were not liable:—Quare, apart from this, whether the plaintiff could have recovered, he being aware that the road was without ballast, the defects in construction being patent, and such tramways being known not to be substantially built or of a permanent character. *McFarlane v. Gilmour et al.*, 5 O. R. 302.—C. P. D.

Plaintiff sued as administratrix of her husband, who was killed by an explosion of defendants' powder mills at C., in Ontario, the head office of defendants being at M. in Quebec. The works at C. were carried on through a superintendent, who hired, paid, and discharged the workmen, saw that the works were kept in repair and generally managed and controlled the business, subject to instructions from the head office and to the directions of one W., a director of the company who lived at H., in Ontario, and occasionally visited the works. Some time before the explosion and while the works were idle, W. visited them. At that time the shaker, a machine used in the manufacture of powder in one of the buildings, was out of repair. This W. directed C. the superintendent, and D. a carpenter, employed on the premises, to have repaired before recommencing operations, which, however, was not done, either through neglect on the superintendent's part, or in consequence of the company's having sent orders to be filled before it could be attended to:—Held that though the superintendent's neglect was the neglect of a fellow workman, yet that W., a director, having given express directions to have the repairs made, C.'s neglect to repair the shaker was the neglect of the company, who were therefore liable. *Matthews v. The Hamilton Powder Co.*, 12 O. R. 58.—Q. B. D.

See also *Ryan v. Canada Southern R. W. Co.*, 10 O. R. 745; *McLaughlin v. The Grand Trunk R. W. Co.*, 12 O. R. 418.

### MASTER IN CHAMBERS.

See PLEADING—PRACTICE.

### MASTER IN ORDINARY.

See PLEADING—PRACTICE—TRIAL.

## MASTER OF SHIP.

See SHIP.

## MAXIMS.

"De minimis non curat lex." See *Clauston v. Shibley et al.*, 9 O. R. 451; 10 O. R. 295.

"Quicquid plantatur solo, solo cedit." See *The Stevens, Turner, and Burns Foundry and General Manufacturing Co., Limited v. Barfoot*, 9 O. R. 692.

"Injuria non excusat injuriam." See *Ratcliffe v. Booth*, 11 O. R. 491.

"Caveat emptor." See *Boothwick v. Young*, 12 A. R. 671.

## MEASURE OF DAMAGES.

See D. MAGES.

## MECHANICS' LIEN.

See LIEN.

## MEDICAL PRACTITIONERS.

## I. PRACTISING WITHOUT REGISTRATION, 427.

## II. NEGLIGENCE AND MALPRACTICE, 428.

## I. PRACTISING WITHOUT REGISTRATION.

The defendant, who was agent for a dealer in musical instruments, undertook to cure one P. of cancer by friction and application of a certain oil, receiving as remuneration \$3 a visit, which he stated was for the medicine, being its actual cost. He admitted having practised in Germany, and that he imported the specific in question by the gross. It also appeared that he prescribed other medicine for the patient besides the oil:—Held, that this was practising medicine, and that the defendant was rightly convicted of doing so for gain or hope of reward without registration under the Medical Act. *Regina v. Hall*, 8 O. R. 407.—Rose.

A conviction under the "Ontario Medical Act," (R. S. O. c. 142, s. 40), for practising without being registered, was quashed, because in default of payment of the fine imposed, distress was also awarded; and, held, that s. 57 of c. 31, of 32-33 Vict. (Dom.), does not apply as by s. 46 of the Medical Act provision is made for enforcing payment. Held, also, that s. 40 applies to any person whose name has been erased from the register, though he may have practised after having been first registered. *Regina v. Sparham*, 8 O. R. 570.—Rose.

Seem, that on a prosecution under the Act the defendant may shew that as a matter of law his name was on the register, though by accident or design improperly removed or erased therefrom. *Ib.*

## II. NEGLIGENCE AND MALPRACTICE.

Action against a medical man for malpractice. The alleged malpractice consisted in applying what was called the primary bandage to a fracture of the forearm; and, if this was good surgery, then there was neglect and want of proper care, in applying the bandage too tightly, and in not placing the arm in proper position, whereby the arm became paralyzed and permanently useless. The defendant admitted the use of the primary bandage, and justified its use as proper, and denied that there had been any neglect, &c. The jury found for the defendant:—Held, on the evidence the verdict could not be interfered with. *Van Mee v. Farewell*, 12 O. R. 285.—C. P. D.

A medical man called by the defendant stated, from the evidence given by the defendant, and the evidence given throughout the case, he could not say the defendant's treatment was bad surgery. The plaintiff proposed to call evidence in reply to shew from what defendant stated at the trial the treatment was bad surgery:—Held, inadmissible. *Ib.*

In an action against a medical practitioner for malpractice the plaintiff must prove not only that there was negligence or want of skill on the part of the defendant, but also that the plaintiff was injured thereby. *McQuay et al. v. Eastwood*, 12 O. R. 402.—C. P. D.

In this case, which was for negligence and want of skill in the treatment of the plaintiff in her confinement, the jury found that the defendant was guilty of such negligence, in that he was remiss in giving instructions to the nurse, and in not seeing that his instructions were properly carried out:—Held, that the inconsistency in the finding would not entitle the defendant to judgment dismissing the action, but at most to a new trial if there was evidence to go to the jury thereon:—Held, however, that there was no evidence from which it could reasonably be inferred that the injury complained of by the plaintiff was attributable to either want of skill or care, or negligence by defendant; and judgment was therefore directed to be entered dismissing the action. *Ib.*

In an action against the defendant, as a surgeon, for negligence, the jury found for the plaintiff, but added to their verdict the following: "We are of opinion that the defendant made a mistake in not calling in skilful assistance, but not wilfully or through inattention:"—Held, a mere expression of opinion, and that it did not nullify or affect the verdict. *Sheridan v. Pigon*, 10 O. R. 632.—Q. B. D.

## MEETINGS.

## I. ELECTION—See PARLIAMENTARY ELECTIONS.

## II. OF COUNCILS—See MUNICIPAL CORPORATIONS.

## MEMORIALS.

PROOF OF DEED BY—See EVIDENCE.

## PRACTICE.

for malpractice, ed in applying mortgage to a fraction was good sur- want of proper tightly, and in sition, whereby permanently use- the use of the s use as proper, my neglect, &c. unt:—Held, on ot be interfered O. R. 285.—C.

defendant stated, defendant, and e case, he could t was had sur- call evidence in unt stated at the ery:—Held, in-

practitioner for prove not only ut of skill on the hat the plaintiff al, v. *Eastwood*,

negligence and f the plaintiff in ad that the de- gence, in that he is to the nurse, ctions were pro- he inconsistency e the defendant ion, but at most nce to go to the that there was d reasonably be nained of by the her want of skill ant; and judg- be entered dis-

ndant, as a sur- und for the plain- the following: defendant made a l assistance, but ction:—Held, a d that it did not *Meridan v. Pigron*,

## MENTARY ELEC-

## CIPAL CORPORA-

## EVIDENCE.

## MENTAL INCAPACITY.

See LUNATIC—WILL.

Incapacity to understand the nature and obli- gation of an oath. See *Udy v. Stewart*, 10 O. R. 591.

## MERCHANTS' SHIPPING ACT.

See SHIP.

## MERGER.

See MORTGAGE.

See *Attrill v. Platt*, 10 S. C. R. 425, p. 209.

## MILLS AND MILL OWNERS.

See WATER AND WATER COURSES.

## MINISTER OF AGRICULTURE,

Jurisdiction in matters relating to patents of invention. See *In re Bell Telephone Co.*, 9 O. R. 339.

## MISJOINDER.

See PLEADING.

## MISREPRESENTATION.

See FRAUD AND MISREPRESENTATION.

## MISTAKE.

- I. OF TITLE—See IMPROVEMENTS ON LAND.
- II. DESCRIPTION OF LAND—See DEED.
- III. RECTIFYING DEED—See DEED.
- IV. MONEY PAID UNDER MISTAKE—See PAYMENT.

Reissue of patent of invention owing to mis- take in specification and description. See *With- ow et al. v. Malcolm et al.*, 6 O. R. 12.

Rectifying mistake in accounts. See *Taylor v. Magrath*, 10 O. R. 669.

Held, that the rule that the court will not in- terfere to rectify an instrument upon parol evi- dence, on the ground of mutual mistake, when the defendant denies that there was such mutual mis- take, only applies where the defendant so deny- ing was a party to the instrument in question. *Ferguson v. Winsor*, 10 O. R. 13.—O'Connor. See S. C. 11 O. R. 88.

Mistake as to number of acres in a lot sold in bulk. See *Cottingham v. Cottingham*, 11 A. R. 624.

## MONEY.

- I. FOLLOWING MONEY FRAUDULENTLY OB- TAINED, 430.
- II. FOLLOWING TRUST MONIES—See TRUSTS AND TRUSTEES.
- III. INTEREST—See INTEREST ON MONEY.
- IV. INVESTMENTS—See INVESTMENT OF MONEY.
- V. MONEY PAID UNDER PROTEST OR MISTAKE —See PAYMENT.
- VI. MONEY IN COURT—See PAYMENT.
- VII. AUTHORITY TO RECEIVE—See SOLICITOR.

## I. FOLLOWING MONEY FRAUDULENTLY OBTAINED.

D. J. endorsed a promissory note for the ac- commodation of W. J., who discounted it, and gave D. J. a mortgage on certain land to indem- nify him against his liability as indorser on the note. W. J., during the currency of the note, absconded, after obtaining from M. by false pre- tensions a cheque for a large sum, which he cashed, and gave part of the proceeds to D. J. to take up the note, which D. J. did before maturity. W. J. told D. J. that he had got the money from M., with whom he had had dealings, as D. J. knew, but D. J. had no notice of any wrong doing in connection with the money:—Held, (affirming the judgment of Boyd, C., 10 O. R. 1,) that the mortgage ceased to be an incumbrance on the land when the note was retired; that M. could not follow his money into the note, and was therefore not entitled to stand in the shoes of D. J., as to the security held by him, even if it had been a mortgage to secure the payment of the note. *Jack v. Jack*, 12 A. R. 476.

Deposit of client's money to credit of solicitor. See *Bailey v. Jellett et al.*, 9 A. R. 187, p. 42.

See, *Giraldi v. La Banque Jacques Cartier*, 9 S. C. R. 597, p. 162.

## MORTGAGE.

- I. CONTRACTS OF MORTGAGE.
  1. Form of, 431.
  2. Mortgage or Purchase, 432.
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- II. PAYMENT MERGER AND DISCHARGE.
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- III. RIGHTS AND LIABILITIES OF PARTIES, AND THOSE CLAIMING UNDER THEM.
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2. *Right of Mortgagee to Maintain Actions*, 434.

3. *Recovery of the Mortgage Money*.

(a) *Interest*, 435.

(b) *Right of Distress*—See DISTRESS.

4. *Other Cases*, 436.

5. *Barred by Time*—See LIMITATION OF ACTIONS.

IV. ASSIGNMENT AND TRANSFER, 438.

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VI. REDEMPTION OF MORTGAGES.

1. *Who Entitled to Redeem*, 439.

2. *Costs*, 441.

VII. FORECLOSURE.

1. *Opening Foreclosure*, 441.

VIII. PROCEEDINGS IN MORTGAGE SUITS.

1. *Taking Accounts*, 441.

2. *Multiplicity of Proceedings*, 442.

3. *Costs*, 443.

IX. MISCELLANEOUS CASES, 444.

X. DOWER IN MORTGAGED LANDS—See DOWER.

XI. FIXTURES—See FIXTURES.

XII. MECHANICS' LIENS ON MORTGAGED PROPERTY—See LIEN.

XIII. MORTGAGE BY EXECUTORS—See EXECUTORS AND ADMINISTRATORS.

XIV. MORTGAGES OF CHATTELS—See BILLS OF SALE AND CHATTEL MORTGAGES.

XV. MORTGAGEES AS PARTIES IN ACTIONS—See PLEADING.

I. CONTRACTS OF MORTGAGE.

1. *Form of*.

M. gave a mortgage to T. on certain lands. The mortgage was in the statutory short form except that immediately after the printed covenant for payment the following words were inserted in writing: "It being understood, however, that the said lands only shall in any event be liable for the payment of the mortgage." The distress clause remained unaltered in its usual place, viz.: after the covenants. T. assigned the mortgage to H., who, on an instalment of interest falling due, distrained for it. M. now brought this action for a wrongful distress:—Held, that M. was entitled to recover the amount distrained for with interest and costs, for the earlier provision controlled the subsequent one, both because it was first in the deed, and because it was in writing, and the words superadded in writing were entitled to have greater effect attributed to them than the printed clauses. *McKay et al. v. Howard*, 6 O. R. 135.—Boyd.

A mortgage deed, purporting to be made pursuant to the Short Forms Act contained the following: "Provided that the said mortgagee on default of payment for two months, may, without giving any notice, enter on and lease or sell the said lands." The mortgage was assigned to

G. and K., who assumed to sell under the above power:—Held, that they could not confer a good title upon the purchaser, for that in construing the above power resort could not be had to the long form in the Act, inasmuch as notice was dispensed with, which was not a mere exception from nor qualification of the short form given in the Act, but an abolition of one of its most important terms; and the power thus being left to its own force, no one but the persona designata, the original mortgagee, could exercise it. A transfer of the estate does not involve the transfer of trusts or powers necessarily as inseparable incidents of the estate. *Re Gilchrist and Island*, 11 O. R. 537.—Boyd.

See *Coleman v. Hill et al.*, 10 O. R. 172, p. 181; *Trust and Loan Co. v. Lawrason et al.*, 10 S. C. R. 679, p. 196.

2. *Mortgage or Purchase*.

In August, 1866, the plaintiff in consideration of \$500, which she asserted was by way of loan, conveyed to M. 100 acres of land by a deed absolute in form. The plaintiff alleged that M. agreed that if the money were repaid during his lifetime, he would accept the same and reconvey the land. The plaintiff in 1871 applied to M., to accept the amount of principal and interest remaining due, (she alleging that she had paid \$10 on account thereof,) and reconvey the land to her, which request M. refused to comply with. Subsequently, and in June of that year, M. sold and conveyed the land to R. & McK., for \$1,200, and they in June, 1872, sold and conveyed to B., for \$2,000, alleged to be its full value, taking a mortgage for part of the consideration money, which they transferred for value to one W. (not a party to the suit). During the time R. & McK. held the property, they, with the knowledge of B., had cut and disposed of large quantities of wood and timber growing thereon, without any attempt on the part of the plaintiff to restrain them. In November, 1873, the plaintiff instituted proceedings in Chancery seeking to redeem alleging that the deed she gave was intended as a security merely, and a decree was pronounced in her favour, Spragge, C., being of opinion that the transaction was in reality one of mortgage and that on the pleadings set out in the report, the defendants R. & McK. and B., had distinctly admitted the allegations of the bill in this respect. On appeal, this Court being equally divided the appeal was dismissed, and the decree for the plaintiff stood affirmed. Per Hagarty, C. J., and Burton, J. A.—At most the transaction was one of purchase by M., with a verbal undertaking on his part to re-sell on payment of what should be found due. Patterson, J. A.—While entertaining grave doubts of the plaintiff's right to recover, thought that the evidence did not establish the fact of B. having purchased without notice of the plaintiff's alleged right to redeem; and in view of the fact that Spragge, C. who heard the evidence considered that the fact of notice was fully established, thought the decree should be affirmed. Per Proudfoot, J.—The transaction was in reality a security only for the advance of money, and B., bought with actual notice of the plaintiff's claim, and therefore she was entitled to redeem. *Peterkin v. McFarlane*, 9 A. R. 429.

II.

Held to the mortgage principle only so far as the law from the *Gillen* decision of 7 O. R.

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## II. PAYMENT, MERGER AND DISCHARGE.

### 1. Attorney or Agent.

Held, that custody of a mortgage gives no right to the custodian whether he be the solicitor of the mortgagee or not, to receive any part of the principal or interest secured. A mortgage not only secures money, but it affects the land, and so for its effectual discharge not only payment but re-conveyance is essential, and for this reason the law does not infer a right to receive the money from the mere possession of this kind of security. *Gillen v. The Roman Catholic Episcopal Corporation of the Diocese of Kingston in Canada et al.*, 7 O. R. 146.—Boyd.

G., a mortgagee, left her mortgage in the office of M., her solicitor. F., the mortgagor, paid the interest and \$3,000 on account of principal to M., who paid over the interest, but retained the \$3,000, of which the mortgagee knew nothing. F. subsequently paid a further sum of \$1,500 on account of principal, and other sums of interest, all of which were paid over to G.:—Held, that there was no implied authority to receive the principal, and that the adoption of a later payment of principal could not of itself be held to ratify the prior unknown payment. *Ib.*

M. desiring to raise money upon mortgage of his lands, part whereof was to go to pay off certain existing incumbrances thereon, arranged with a certain solicitor that the latter should get him the money, and he and his wife executed a mortgage for the amount, and left it in the hands of the solicitor. The latter received the mortgage money from the mortgagee and absconded. M. now sued the mortgagee, claiming the money or a discharge of the mortgage:—Held, that leaving the mortgage with the solicitor did not prove that the latter was M.'s agent to receive the money, and the defendant had not satisfied the onus resting upon him of proving this fact, and therefore M. was entitled to judgment as claimed. *McMullen v. Polley*, 12 O. R. 702.—Proudfoot.

### 2. Presumption of Payment.

In examining a title the purchaser found a mortgage which matured over 80 years previously, apparently outstanding, and required the vendors to produce the discharge of it, which they declined to do:—Held, that under all the circumstances, the mortgage must be presumed to have been paid. *Imperial Bank of Canada v. Metcalfe*, 11 O. R. 467.—Ferguson.

### 3. Merger of Mortgage Debt.

The defendant having mortgaged certain lands, conveyed them to one P., and afterwards, becoming insolvent, he included this in his schedule as an indirect liability. The conveyance was silent as to whether it was a sale of the equity of redemption merely, or of the whole estate, the payment of the mortgage being part of the consideration, but from the evidence the court inferred the latter. The mortgagee, who had been no party to the arrangement, afterwards obtained from P. the equity of redemption which he caused to be assigned to his wife, in order as he said to prevent a merger; and he then sued the defendant on the covenant for the mortgage money:—Held, that there was no

merger, and that the plaintiff was entitled to recover. *Mardonald v. Bullivant*, 10 A. R. 582.

### 4. Discharge and Certificate.

In respect to discharges of mortgages, what the Registry Act makes tantamount to a re-conveyance is the certificate of discharge and the registration of it, not the execution of the certificate merely. *In re Masie Hall Block, Dumble v. McIntosh*, 8 O. R. 225.—Ferguson.

The equity of redemption in the deed conveyed was subject to a mortgage, a discharge of which was registered on July 21st, 1875, the same day as the deed:—Held, that the deed must be assumed to have been delivered before it was registered, and the discharge of the mortgage on registration operated as a re-conveyance to B., who was the assignee of the mortgage within the meaning of the Act respecting the effect of registering a discharge. *Imperial Bank of Canada v. Metcalfe*, 11 O. R. 467.—Ferguson.

See *Gillen v. The Roman Catholic Episcopal Corporation of the Diocese of Kingston in Canada et al.*, 7 O. R. 146, p. 433; *Lawlor v. Lawlor*, 10 S. C. R. 194, p. 212.

## III. RIGHTS AND LIABILITIES OF PARTIES AND THOSE CLAIMING UNDER THEM.

### 1. Right of Mortgagor to Maintain Actions.

Held, that O. J. Act, s. 17, sub-s. 5, enables a mortgagor, entitled to the possession of land, as to which the mortgagee has given no notice of his intention to take possession, to sue to prevent or recover damages in respect of any trespass or other wrong relative thereto in his own name only, and that the objection that the mortgagees should be parties ought not to prevail. *Platt v. The Grand Trunk R. W. Co. of Canada*, 12 O. R. 119.—Proudfoot.

### 2. Right of Mortgagee to Maintain Actions.

C., owner of the premises in question, mortgaged them on 6th February, 1880, to the C. P. L. & S. Co. On 17th March, 1883, C. made a second mortgage to L. who assigned to plaintiff. On 5th October, 1883, C. leased the premises to defendant for ten years from 1st April, 1884, at \$175 for the first year, and \$165 for subsequent years, payable in advance on 27th October in each year. The lease contained a clause that rent should be paid to H., or sent to the mortgagees "as payments of interest on loan made by the lessor." H. was the local agent of the first mortgagees. The clause referred to was inserted in the lease at defendant's request. The rent payable on 27th October, 1883, 1884, and 1885, was paid by defendant to H., who remitted the money to the company. H. gave defendant receipts for the rent as agent for C. The company sent H. receipts for the money forwarded by him, expressing that the money was received on account of advances made to C. H. had no authority to receive money for the company. The company were not made aware of the existence of the lease, or of its provisions. The plaintiff brought this action to recover possession of the mortgaged premises, his mortgage

being in default. The defendant set up the lease and the clause referred to, the payment of rent to the company, and that he was tenant to the company, whose mortgage was in default:—Held, reversing the decision of *Boyd, C.*, that, as the company received the money sent them by H. not as rent of the mortgaged lands, but on account of advances made to C., they could not under the evidence be held to be mortgagees in possession, and that defendant was not their tenant:—Held, also, that even if the company had been aware of the provision in the lease and had received the money with such knowledge, they would not have been mortgagees in possession with defendant as their tenant, as the money under the very terms of the provision would not have been received as rent, but "as payments of interest on a loan made by the lessor." The plaintiff was therefore held entitled to recover. *Frost v. Hines*, 12 O. R. 669.—Q. B. D.

See *Ward v. Hughes*, 8 O. R. 138, p. 76.

### 3. Recovery of the Mortgage Money.

#### (a) Interest.

On an appeal from a report of a master who had allowed more than six years of arrears of interest in taking an account of what was due on a mortgage containing a covenant to pay interest:—Held, that in a foreclosure suit, interest when due for more than six years should be allowed in taking the mortgage account instead of allowing it for six years only, and compelling the plaintiff to bring another action on the covenant to recover the balance:—Held, also, that more than ten years' arrears of interest had been rightly allowed. *Howen v. Bradburn*, 22 Chy. 96, commented on; *Allan v. McTavish*, 2 A. R. 278, followed. *Macdonald v. Macdonald*, 11 O. R. 187.—Chy. D.

The covenant provided for payment of interest at nine per cent. up to the end of a year from the date of the mortgage:—Held, that there being no evidence why such rate of interest was provided for, and it being matter of common knowledge that nine per cent. was not considered excessive for advances in the year 1866, when the mortgage was made, and some following years, the same rate of interest should be allowed for the years subsequent to the expiry of the first year. *McDonald v. Elliott*, 12 O. R. 98.—Rose.

A mortgage contained the following proviso for repayment: " \$3,000, with interest at eight per cent. per annum, the principal sum to be paid as follows," (in sums of \$1,000 yearly) \* \* " with interest at the rate aforesaid on the whole unpaid principal payable half yearly \* \* until payment in full, to be computed from the 1st day of June, instant, with interest at the same rate on all overdue payments of interest." During certain proceedings on the mortgage in which the mortgagor disputed his liability to pay the balance due on the mortgage, the money was paid into Court where it remained for some six years, when it was paid out to the mortgagee who had succeeded in establishing his right to it. The master in taking the accounts between the parties allowed no interest on the money paid in, the mortgagees having received the court rate, and he allowed interest on the mortgage after its maturity at the rate therein provided up to

the time appointed by the court for payment, and certified that he allowed it as a matter of contract and not as damages. On appeal and cross-appeal from both of these findings, it was:—Held, following *Sinclair v. The Great Eastern R. W. Co.*, L. R. 5 C. P. 391, that the mortgagor should pay interest on the sum paid into court beyond the court rate, and following *St. John v. Rykert*, 10 S. C. R. 278, that eight per cent. (the rate provided for) was not payable after the maturity of the mortgage, from which time the legal rate only was recoverable. *McDonald v. Elliott*, 12 O. R. 98, referred to and distinguished. *Powell v. Peck et al.*, 12 O. R. 492.—Proudfoot.

See *St. John v. Rykert*, 10 S. C. R. 278, p. 49; *Gordon et al. v. Gordon et al.*, 11 O. R. 611, p. 253; *Trinity College v. Hill et al.*, 8 O. R. 286, p. 443.

#### 4. Other Cases.

After default made in a mortgage, the mortgagor took proceedings under the power of sale and brought an action of ejectment and an action on the covenant. He died during the progress of these proceedings. In the two actions judgments were recovered against the mortgagor and the lands were sold under the power of sale; the purchase money being paid partly in cash and partly by a mortgage for the balance. This mortgage was subsequently turned into cash at a less amount than its face value, and in addition solicitors costs for doing so were charged. In an action for an account by the mortgagor against the mortgagee's executors, who had continued the proceedings. It was:—Held, reversing the judgment of Proudfoot, J., that the defendants were entitled to sell and give time for payment of part of the purchase money without the consent of the mortgagor; but that they must account for the purchase money as cash at the time of the sale, and that they could not charge the mortgagor with the discount on the mortgage or the costs of turning it into cash; and that they were entitled to all three sets of costs; those of the two actions being given to them by the judgments they had obtained; and those of exercising the power of sale under the statutory form of mortgage as a matter of contract, they being made a first charge upon the proceeds of the sale, R. S. O. c. 103. *Bratty v. O'Connor*, 5 O. R. 731.—Chy. D.

Where a mortgagee, who had sold under the power in the mortgage, paid over the surplus on the order of I. J., the apparent owner of the equity of redemption:—Held, that even if the deed under which I. J. claimed was voidable, nevertheless the mortgagee was entitled to act on her order, especially as he had served a notice of sale, on those who now impeached his conduct, while they had done nothing to assert their claim, until after the surplus was so paid over, and as also a suit which had been theretofore commenced to set aside the deed from I. J. as void had been abandoned. *Harper v. Culbert et al.*, 5 O. R. 152.—Ferguson.

In 1856 R. mortgaged certain lands to J. D. C. to secure £550, payable on 1st January, 1863. In 1857 J. D. C. died, having appointed the defendant and another his executors, who duly proved the will. In 1864, after the death of defendant's co-executor, the mortgage was depo-

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sited with H. as security for an advance of \$401,  
as set out in *McLean v. Hime*, 27 C. P. 195,  
whereby H. was declared entitled to hold the  
mortgage as collateral security for the said sum.  
In 1856 H. sold the equity of redemption to Z.  
In 1877 H., by representing that he controlled  
the mortgage, procured the executors of Z., for  
a nominal consideration, to give a conveyance of  
the equity of redemption to A. B. H. as bare  
trustee for him; and in 1878 obtained conveyances  
from other parties interested therein. In  
1879 H. sold the equity of redemption to M. for  
\$5,000. In 1880 S. C., a beneficiary under  
J. D. C.'s will, having made a claim on defend  
ant for her share of the estate, a settlement was  
effected by defendant agreeing to pay \$2,050,  
and assigning the mortgage to her as collateral  
security. S. C. commenced foreclosure proceed  
ings thereon, H. and M. being made parties,  
when a settlement was effected by H. paying S.  
C. \$500, and procuring an assignment of the  
mortgage to be made to plaintiff as bare trustee  
for him. The plaintiff commenced proceedings  
against defendant claiming the \$2,050 secured  
by the agreement made between S. C. and de  
fendant and in default of payment foreclosure:—  
Held, reversing the judgment of Ferguson, J.,  
that H. by representing himself to be mortgagee  
obtained the conveyance of the equity of redemp  
tion, and must therefore account to defendant  
for the amount realised on the sale thereof to M.  
The plaintiff's claim was therefore dismissed, and  
judgment entered for defendant for the difference  
between the \$5,000 with interest and the \$401  
with interest, together with the amount payable  
to S. C. under the agreement. *Wilkins v. Mc  
Lean*, 10 O. R. 58.—C. P. D. Reversed S. C. 13  
A. R. 467.

In an action by cestuis qui trustent against  
executors and trustees of a certain will, a decree  
had been made for the general administration of  
the testator's estate real and personal, a portion  
of the real estate being at the time under mort  
gage made by the executors. The conduct of  
the proceedings having been given to certain  
creditors, a receiver was, at their instance, ap  
pointed to collect the rents of the real estate.  
Afterwards the mortgagees commenced an action  
upon their mortgage (see 8 O. R. 539), making  
the executors and trustees and the tenants of the  
mortgaged property defendants, asking payment,  
possession and foreclosure, when finding the re  
ceiver in possession, they, after some delay, ap  
plied for and obtained leave to proceed with  
their action, a defence, however, being made  
thereto, at the instance of the receiver, contest  
ing the validity of the mortgage. The mortga  
gees having succeeded in establishing their mort  
gage and their right to possession, then applied  
to be added as parties to the reference in the ad  
ministration proceedings, claiming to be entitled  
to all rents collected by the receiver between  
the commencement of the action on their mort  
gage, and their obtaining possession from him.  
They were accordingly added as parties in the  
master's office, who subsequently made his re  
port, finding them entitled to the rents as claim  
ed:—Held, on appeal, that the mortgagees were  
only entitled to the rents from the date of the  
application for the order allowing them to pro  
ceed with their action, notwithstanding the ap  
pointment of the receiver. *Wallace et al. v.  
Wallace et al.*, 11 O. R. 574.—Boyd.

See *Hamilton Provident and Loan Society v.  
Campbell*, 12 A. R. 250, p. 168.

#### IV. ASSIGNMENT AND TRANSFER.

The plaintiff, who was mortgagee of certain  
lands, alleged that L., the present holder of the  
mortgage, purchased it from C. with knowledge  
of the fact that C. had purchased it from the  
original mortgagee as trustee for the plaintiff,  
who was to be allowed to redeem on paying  
whatever C. should pay for the mortgage, and a  
certain additional sum for C.'s services; and  
sought to redeem on payment of what was due  
under the said agreement with C.:—Held, that  
the above agreement fell within the Statute of  
Frauds, and should be evidenced in writing:—  
Held, also, that even if this were not so, L.  
could not be affected by such agreement, having  
purchased without notice of it. *Wright v. Ley  
et al.*, 8 O. R. 88—Chy. D.

Y. being the owner of certain land, mortgaged  
it with other lands to the M. P. R. Society by  
mortgage, dated July 12th, 1873, registered July  
14th, 1873. Subsequently being desirous of sel  
ling part and paying off the mortgage and get  
ting a new loan, he by an agreement in writing,  
arranged with the society to leave the mortgage  
standing, take a further loan of \$700, and have  
certain of the lands (of which the lot in question  
was part) released by the Society. A second  
mortgage for the \$700 advance was prepared and  
executed dated February 1st, 1875, registered  
February 11th, 1875, which by mistake as was  
alleged, included all the lands in the first mort  
gage: and a release dated February 9th, 1875,  
was duly executed by the Society releasing the  
lot in question from the operation of the mort  
gage of July 12th, 1873, and was afterwards  
registered March 20th, 1876. B., the plaintiff,  
being aware of the agreement, but unaware that  
the second mortgage included the lot in question  
which should have been omitted, loaned Y. cer  
tain moneys, and took a mortgage dated May 21st,  
1877, registered June 6th, 1877, to secure the  
payment thereof. The Society assigned the sec  
ond mortgage and all moneys secured thereby  
to defendants by assignment dated March 1st,  
1880, registered January 17th, 1881, and by deed  
dated March 1st, 1882, registered June 2nd,  
1883, Y. conveyed his equity of redemption to  
B. In an action by B. to correct the mistake  
by compelling the defendants to convey the lot  
in question to B.; it was—Held, affirming the  
judgment of Ferguson, J., that the combined  
operation of R. S. O. c. 111, s. 81, and R. S. O.  
c. 95, s. 8, formed a complete defence, and for  
that the defendants as assignees of the mortgage  
for value, having the legal estate, might defend  
as a purchaser for value without notice, and  
claim also the protection of the Registry Act, as  
against the plaintiff a subsequent purchaser or  
mortgagee from the original mortgagor:—Semble  
that even as against the mortgagor the defend  
ants would also be entitled to prevail. *Bridges  
v. The Real Estate Loan and Debenture Company*,  
8 O. R. 493.—Chy. D.

#### V. SALE UNDER POWER OF SALE.

K. gave a mortgage of leasehold premises to  
the Imperial Loan and Investment Co., with a

covenant authorizing the company to sell the premises on default, with or without notice to mortgagor, and either at public or private sale. The mortgage conveyed the unexpired portion of the current term, and "every renewed term." K., shortly after giving the mortgage, conveyed the equity of redemption in the mortgaged premises to one O'S. for a nominal consideration, and in trust to carry out certain negotiations for K., who then left the country and was absent for several years. During his absence the lease of the ground mortgaged to the company expired, and was renewed in the name of O'S. Default having been made in the payment of interest under the mortgage, a suit was brought against O'S. for foreclosure, the mortgagees having knowledge of his want of interest in the premises. Prior to such suit O'S., fearing that such proceedings would be taken against him, had executed a deed of re-conveyance of the equity of redemption to K., but such deed was never delivered. O'S. then filed an answer and a disclaimer of interest in such suit, but he was afterwards persuaded by the mortgagees to withdraw the same and consent to a decree, and a final order of foreclosure was made against him. Pursuant to this order the company subsequently sold the mortgaged premises to the defendant D. for a sum less than the amount due under the mortgage; the deed to D. recited the proceedings in foreclosure, and purported to be made pursuant to the final order of foreclosure. K. brought a suit against the company and D. to have the decree reopened and cancelled, and the deed to D. set aside, and prayed to be allowed to come in and redeem the premises:—Held, affirming the judgment of the Court of Appeal, 11 A. R. 526, (Strong and Henry, JJ., dissenting,) that even if the decree of foreclosure was improperly obtained, and consequently void, yet the sale and conveyance to D. were a sufficient execution of the power of sale in the mortgage, and passed the renewed term conveyed by the mortgage. *Kelly v. The Imperial Loan and Investment Co. of Canada*, 11 S. C. R. 516.

See *Dufresne v. Dufresne et al.*, 10 O. R. 773, p. 277; *Re Gilchrist and Island*, 11 O. R. 537, p. 432.

## VI. REDEMPTION OF MORTGAGES.

### 1. Who Entitled to Redeem.

Held, (overruling the decision of *Wilson, C. J. C. P.*), that the right of a tenant for years to redeem a mortgage is absolute, and the court has no discretion to grant or refuse redemption. *Martin v. Miles*, 5 O. R. 404—Chy. D.

Held, accordingly, in this case, where a tenant for years under a demise made subsequently to a mortgage, sought to redeem the lands in the hands of the mortgagee, who had obtained an order for foreclosure in a suit to which the present plaintiff was not a party, the plaintiff had a right to redeem in the event of the mortgagee refusing to accept him as a tenant. *Id.*

Held, also, that although the plaintiff had at one time, before commencing this action, offered to give up possession on payment of \$40, yet inasmuch as this offer had not been accepted by the defendant or acted upon at any time, the plaintiff had done nothing to waive or prejudice his rights of redemption as such lessee by such offer. *Id.*

After action brought, however, the defendant offered to confirm and adopt the plaintiff's lease, though before action she had refused to do so, and had, indeed, sold the property to a purchaser without making the sale subject to the lease, of which, nevertheless, the purchaser had full notice:—Held, per *Wilson, C. J. C. P.*, that the lateness of the defendant's assent to affirm the lease only affected the costs; she had done nothing that debarred her from now confirming the lease of which the plaintiff was still claiming the benefit, and accepting the plaintiff as tenant, on behalf of herself and as representing the purchaser, and as she was willing now so to do, the plaintiff could not redeem. *Id.*

Held, also, that in an action for redemption, if tender is made after action commenced, it must be enough to cover the costs of the plaintiff already incurred; and if it be so, the plaintiff is bound to accept it, and any litigation afterwards must be at his expense. *Id.*

Per *Wilson, C. J. C. P.*—It may be said as a rule that everyone having an interest from the mortgagor in the land can redeem the mortgage. *Id.*

Plaintiff, being the wife of A. W. C. who mortgaged his lands, she joining therein for the purpose of barring her dower, brought an action to be allowed to redeem the mortgaged premises after foreclosure by the mortgagee against the husband, but during the husband's lifetime. A demurrer to the plaintiff's statement of claim, on the ground that the plaintiff had no interest in the lands, and that her pleadings affirmed that her husband's interest had been foreclosed, was allowed. *Casner v. Haight et al.*, 6 O. R. 451.—Proudfoot.

I, being the owner of certain property, mortgaged it to McL., who sold under the power of sale in the mortgage to G., who attended the sale under instructions from McL., and purchased as his agent. McL. deeded the property to G., and G. reconveyed it to McL. I was not aware that G. was McL.'s agent. McL. being aware that the sale might not be valid subsequently bargained with I. for the purchase of two other lots, and made it a condition that the deed should cover the two lots and the mortgaged property, and that I's wife should join in it, which she had not done in the mortgage. McL. swore that the bargain was that he was to get a clear deed of the mortgaged property. I swore that nothing was said about a clear deed. Before the deed was delivered I. ascertained that G. was McL.'s agent at the sale, and he refused to deliver it, and brought an action for redemption:—Held, that the plaintiff was entitled to redeem. Per *Boyd, C.*—If the defendant did know, as a matter of fact, the legal effect of G.'s action in buying the property, he should have disclosed it to the plaintiff before he sought to acquire the equity of redemption from him by means of a conveyance of which the obvious intent was only to procure her wife's dower to be barred: if he did not know the effect of it the equity of redemption was not in his contemplation as a property to be acquired from the plaintiff. *Inglis v. McLaurin*, 11 O. R. 380.—Chy. D.

Per *Cameron, C. J. C. P.*—Though it may be that a mortgagee is not, strictly speaking, a trustee for the mortgagor, but is entitled to enforce his security for his own benefit to satisfy the mort-

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## VIII.

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the mortgage. *Id.*  
f A. W. C. who  
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e, 6 O. R. 451.

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emption :—Held,  
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ge money, the right of the mortgagor to redeem  
a very pronounced and decided right, and one  
that he cannot be deprived of by any dealing  
between him and the mortgagee that is not carried  
out in a full spirit of fairness without undue  
pressure, influence, or concealment of anything  
of which he should be informed by the mortgagee.  
*Id.*

See *Peterkin v. McFarlane*, 9 A. R. 429, p. 432.

## 2. Costs.

See *Martin v. Miles*, 5 O. R. 404, p. 440.

## VII. FORECLOSURE.

### 1. Opening Foreclosure.

Proceedings were instituted, in 1876, against  
two persons interested in a mortgage estate, one  
of whom was resident out of the jurisdiction, and  
the usual decree and account was made and taken.  
The application to make such decree absolute  
as not made until May, 1882, and in the early  
part of the month following a petition was pre-  
sented praying that the defendants might be  
allowed to redeem, alleging the ignorance of the  
absent defendant of the proceedings until his  
return to the country, a few days before signing  
the petition, and the ignorance of both defend-  
ants of any proceedings subsequent to the filing  
of the bill ; and that the defendant upon whom  
the bill was served was about ninety years old,  
and of feeble intellect, unfitted to transact busi-  
ness. It was shown that in March, 1882, before  
the order making the decree absolute, the plain-  
tiffs had sold to one Grattan, who bought, rely-  
ing on the plaintiffs' title under the final order  
of foreclosure, which, on its face, was expressed  
to be subject to the General Orders of Chancery  
114-5-6. Under the circumstances the Court  
(reversing the order of Boyd, C., 2 O. R. 348),  
made an order to open the foreclosure on the  
usual terms of paying principal, interest, and  
costs of plaintiffs, and of the purchaser (not in-  
cluding any costs of the appeal, of which each  
party should bear their own), together with any  
costs incurred by the purchaser in connection  
with his purchase of the property, and in default  
of payment on or before the day appointed for  
payment the appeal to be dismissed, with costs.  
*Trinity College v. Hill*, 10 A. R. 99.

See *Paisley v. Broddy*, 11 P. R. 202, p. 378.

## VIII. PROCEEDINGS IN MORTGAGE SUITS.

### 1. Taking Accounts.

The T. & L. Co. being mortgagees of land in  
Ontario, held a collateral mortgage on lands in  
Kansas. Default occurring they sold the lands  
in Ontario, through one W., a land agent, who  
had acted also under a power of attorney for C.  
the mortgagor, who had agreed to a commission  
being allowed to him for selling. W. did not,  
however, actually sell until after C.'s death,  
when the T. & L. Co. paid him his commission :—  
Held, on an action for an account brought by an  
execution creditor, who had obtained his execu-  
tion after the power of attorney had been given  
to W., and after the said agreement as to com-  
mission, that the commission was a proper item

to allow the T. & L. Co. in their account. *Wells*  
*v. The Trust & Loan Co. of Canada*, 9 O. R.  
170.—Boyd.

After the mortgage on the Kansas lands had  
been executed, the mortgagees discovered that the  
lands comprised in it had been sold for taxes, and  
that there were also several executions against  
them, and they incurred expenses in attempting  
to stay the executions, and set aside the tax sales.  
The mortgagor, C., had approved of these pro-  
ceedings being taken :—Held, that these expenses  
ought also to be allowed to the T. & L. Co. in  
their accounts, for whatever bound the mortga-  
gor in taking the accounts bound the plaintiff to  
the same extent. *Id.*

The T. & L. Co. further incurred expenses in  
prosecuting unsuccessful litigation arising out of  
a claim made by them as landlords under the dis-  
tress clause in their mortgage, to certain goods of  
C. seized by the sheriff under executions against  
him. C. did not sanction this litigation :—Held,  
that this expenditure could not be allowed to the  
T. & L. Co. in taking the accounts, but that as  
they made a certain sum by this litigation, the  
costs up to that point should be allowed to them.  
*Id.*

The general rule is, that a mortgagee is not  
allowed to add to his mortgage debt the costs of  
unsuccessful proceedings at law instituted by  
himself, and not undertaken with the approval  
of the mortgagor. *Id.*

There should be no alteration in the amount  
found due by the master when such amount has  
not been appealed against. *Gordon et al. v.*  
*Gordon et al.*, 12 O. R. 593—Chy. D.

On a reference to take accounts in a mortgage  
case it is not open to the defendants to contend  
that the original loan was ultra vires ; nor can  
any defence be raised in the master's office which,  
if allowed, might result in determining that the  
court had made a nugatory order of reference.  
*Wiley v. Ledyard*, 10 P. R. 182.—Hodgins,  
*Master in Ordinary*.

Mortgagees after the exercise of the power of  
sale in their mortgage claimed that \$182.61 was  
still due to them, but on an account being taken  
\$20.07 was found due to the mortgagor :—Held,  
that laying aside the question of the whole  
amount of the mortgage money (\$6,705) the  
amount involved was \$202.68, and therefore the  
case was not within Rule 515 O. J. Act (C. S.  
U. C. c. 15, s. 34, sub-s. 8), and the costs were  
properly taxed on the higher scale. The claim  
of a mortgagor against a mortgagee for an ac-  
count in such a case is not a legal one as for a  
money demand, but a proper subject for equita-  
ble relief. *Morton v. Hamilton Provident and*  
*Loan Society*, 10 P. R. 636.—Proudfoot.

### 2. Multiplicity of Proceedings.

The plaintiff gave to the defendant a notice of  
sale under the power of sale in a certain mort-  
gage, and also began an action against the de-  
fendant upon the covenant for payment contained  
in the same mortgage. The notice of sale was  
dated 2nd May, the writ was issued on the 3rd  
May, and both were served on the defendant on  
the 3rd May. No order was obtained permitting  
the action to be commenced. Upon motion to

set aside the service of the writ as contrary to the provisions of the Ontario Mortgage Act, 1884, 47 Vict. c. 16, (Ont.):—Held, that the object of the statute is to prevent all other proceedings while the notice of sale is running, and it is not necessary under the statute, to fulfil the very words of it, that one of the acts should be prior to the other. Service of writ set aside with costs. *Perry v. Perry*, 10 P. R. 275.—Dalton, Master.

### 3. Costs.

In an action for an account by a mortgagor, against the executors of a mortgagee who had sold the mortgaged premises under the power of sale in the mortgage, and who had also taken proceedings at law, a small balance of \$10 was found in his favour. Plaintiff having made charges which he failed to substantiate, and not having proved that an account was demanded and withheld from him, and certain special matter pleaded by the defendants being found against them:—Held, neither party entitled to costs. *Beatty v. O'Connor*, 5 O. R. 747.—Boyd.

In a foreclosure suit a decree was made in November, 1877, and a final order of foreclosure obtained in June, 1878. In October, 1882, a petition was presented by the defendants to open the foreclosure, which was dismissed: 2 O. R. 348. The Court of Appeal reversed this decision, making an order to open the foreclosure on the usual terms of paying principal, interest and costs, including the plaintiffs' costs of opposing the petition: 10 A. R. 99:—Held, affirming the decision of the Master in Ordinary, that the plaintiffs were entitled to interest on the whole amount of principal, interest, and costs as found by the decree of November, 1877:—Held, also, reversing the decision of the Master in Ordinary, that the plaintiffs were not entitled to interest on the taxed costs of opposing the petition to open the foreclosure, for these costs were not recoverable by force of the order made on the petition, which was reversed, but simply owing to the direction of the Court of Appeal:—Held, also, reversing the decision of the Master in Ordinary, that the plaintiffs were not entitled to the costs of a writ of execution issued by them to recover their costs taxed under the order dismissing the petition, for the vacating of that order levelled the writ of execution, which was not part of the taxed costs of the petition but incurred subsequently. *Trinity College v. Hill et al.*, 8 O. R. 286.—Boyd.

The practice of bringing an action for an amount due on a mortgage within the proper competence of the Division Court in the High Court by making a claim for possession of the land, is one that must be carefully guarded; and, except in cases clearly indicating the necessity for proceeding in the High Court, no costs will be given to the plaintiff. *Vandewaters v. Horton*, 9 O. R. 548.—Rose.

In this case where the amount claimed under a mortgage was within the proper competence of the Division Court, but the suit was brought in the High Court, and there were no circumstances shewing the necessity for bringing it therein, no costs were allowed the plaintiff. *Ib.*

See *Wells v. The Trust and Loan Co. of Canada*, 9 O. R. 170, p. 442; *Morton v. Hamilton Provident and Loan Society*, 10 P. R. 636, 442.

### IX. MISCELLANEOUS CASES.

Forfeiture of extended terms of payment.—Relief against forfeiture. See *Graham v. Ross*, 6 O. R. 154, p. 158.

Semble, that if a mortgage upon lands be given to a bank as security for future advances in contravention of the Banking Acts, and after the debt has been contracted or advances made, another mortgage be executed upon the same property as additional security for the debt so contracted or advances made, the second mortgage will be valid. *Grant et al. v. La Banque Nationale*, 9 O. R. 411.—Ferguson.

Under a judgment for redemption obtained by an execution creditor of the mortgagor, the mortgagee who held the title under a deed absolute in form, brought into the master's office with his account certain orders signed by the mortgagor, directing him to pay to the parties named in them, any surplus moneys in his hands after paying his mortgage. The mortgagee did not accept them, but entered them in his real estate ledger, and they were not registered:—Held (1), That such mortgagee could not claim to be allowed these orders in addition to his mortgage, not having accepted or paid them; nor could he be looked upon as a trustee holding the lands in trust for the holders of such orders. (2) That the orders operated as equitable charges or liens on the mortgagor's interest in the lands, prior to the receipt by the sheriff of the plaintiffs' fi. fa. lands, and that such lien holders should be made parties in the master's office, and prove their claims in their own right. *Canadian Bank of Commerce v. Forbes*, 10 P. R. 442.—Hodgins, Master in Ordinary.

Right of municipal corporation to take mortgage from a manufacturer securing performance of conditions on which bonus was granted. See *Corporation of the Village of Brussels v. Ronald*, 11 A. R. 605.

Rights of parties, when mortgage paid by moneys fraudulently obtained. See *Jack v. Jack*, 12 A. R. 476.

Specific bequest of mortgage indebtedness. See *Archer v. Seavern*, 12 O. R. 615.

Liability of universal legatee for hypothec on immovables bequeathed to a particular legatee. See *Harrington v. Corse*, 9 S. C. R. 411.

See *Wilkins v. McLean*, 13 A. R. 484, p. 157; See also *Core v. The Ontario Debenture Co. et al.*, 9 O. R. 236.

### MORTMAIN.

See WILL.

### MOTION FOR JUDGMENT.

See JUDGMENT.

## MULTIPLICITY OF PROCEEDINGS.

See COSTS—MORTGAGE.

## MUNICIPAL CORPORATIONS.

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## X. MATTERS REFERRED TO ARBITRATION, 465.

## I. SEPARATION OF MUNICIPALITIES.

1. *Debts and Liabilities how Affected*.

The township of E., the present plaintiffs, in 1873, passed a by-law for issuing debentures to raise \$6,000, for the purposes of a certain school section, in part comprised in it, and in part in the township of G., and providing for payment of interest, and creation of a sinking fund, and levying of the necessary special rate on the property of the school section. In 1874 the village of P. was incorporated out of a portion of the township of E., being a portion of the said school section, and during the currency of the debentures the corporation of P. collected their share of the moneys, on the requisition of the secretary-treasurer of the school board, and paid over the same to that official, instead of to the treasurer of the township of E., which township never made any requisition on the village of P. to collect the moneys, and itself paid over the moneys collected by it to the secretary-treasurer of the school board. In 1883 the said secretary-treasurer died, and it was found he had converted the sinking fund money to his own use, and had left no assets wherefrom it might be made good. In the same year the debentures fell due, and the township of E. paid them and now sued the village of P. for its pro rata share thereof:—Held, that having regard to 36 Vict. c. 48, s. 56, (Ont.) (R. S. O. c. 174, s. 55), the plaintiffs were entitled to judgment, except as to sums levied and received by the defendants more than six years before action brought, for the defendants should have paid the moneys over to the treasurer of the plaintiffs' corporation; and even if there had been a positive agreement by and with the township of E. that the money should be paid to the secretary-treasurer of the school board, this would have made no difference; for such an agreement would have been ultra vires the township of E., and void as contrary to the statute law, while the sections of 36 Vict. c. 48, relating to arbitrations in cases of separations of incorporated villages from townships, did not apply in this case, so as to prevent the action lying. Held, also, that even if it was impossible to make the judgment productive on the ground that the defendants could not now levy and collect the money, this was no reason why the plaintiffs should not obtain judgment. *The Corporation of the County of Frontenac v. The Corporation of the City of Kingston*, 30 Q. B. 584, distinguished. *The Corporation of the Township of Elderslie v. The Corporation of the Village of Paisley*, 8 O. R. 270.—Ferguson.

2. *Other Cases*.

Seem, that the by-law incorporating the village was not necessarily illegal by reason of the mere fact that the census was in reality taken before the by-law authorizing the enumeration of the people had been passed by the county council. But where the census was shown to be wholly unreliable, and untrue in fact, effect was given to this objection. *Re Fenton et al. v. The Corporation of the County of Simcoe*, 10 O. R. 27.—Wilson.

## II. MEMBERS OF COUNCILS.

1. *Qualification*.

The respondent was rated on an assessment roll in respect of a leasehold property, sufficient

in value to qualify him for office, but the property of his wife, to whom he was married in 1872, and who acquired the property in 1884:—Held, that the respondent had no estate or interest in the property, and therefore was not qualified for office under sec. 73 of the Municipal Act, 1883 (Ont.). *Regina ex rel. Feliz v. Howland*, 11 P. R. 264.—Dalton, Master. But see 49 Vict. c. 37, s. 2.

### III. CONTROVERTED ELECTIONS.

The jurisdiction of the Master in Chambers to grant a quo warranto summons under the Municipal Act, 1883, (Ont.), is established by the 13th sec. of the A. J. Act, 1885. A summons issued within a month after the formal acceptance of office by taking the statutory declarations of qualification and office is in time, notwithstanding that it issued more than six weeks after the election, and more than a month after a speech accepting office made by the respondent at a meeting of electors, and certain other acts of a similar character, less formal than the statutory declarations. *Regina ex rel. Feliz v. Howland*, 11 P. R. 264.—Dalton, Master.

The Master in Chambers is not, in any sense, by delegation or otherwise, a judge of the High Court of Justice to whom power is given by the Municipal Act, 1883, to try and determine cases of controverted municipal elections; nor can such power be given him by the acquiescence of the parties. *Regina ex rel. Wilson v. Duncan*, 11 P. R. 379.—O'Connor.

### IV. ACTION FOR PENALTIES AGAINST CLERK AND DEPUTY RETURNING OFFICER UNDER 46 VICT. C. 18, S. 167.

The plaintiff was a ratepayer of the township and a candidate for the office of reeve, but was not elected. He brought this action under sec. 167 of the Consolidated Municipal Act, 1883, against a deputy returning officer, who was also clerk of the township, to recover the penalty for a contravention of secs. 154, 142, and 245 of the Act. There was no allegation that the plaintiff lost his election, or any votes, or suffered any personal grievance by the acts complained of:—Held, on demurrer to the statement of claim, that the plaintiff was not, by reason only of his being a candidate, a "person aggrieved" within sec. 167, and that he was thereupon not entitled to recover:—Held, also, that an action for the penalty under that section lies only for a breach of sections 118 to 166, inclusive, of the Act. *Atkins v. Ptolemy*, 5 O. R. 366.—Rose.

### V. BY-LAWS.

#### 1. Generally.

A road, originally a trespass road, running from Ottawa to Pembroke, through more than one county, following the course of the Ottawa River, had been used for upwards of forty years, and had become a public highway. The road in its course intersected diagonally lots 1 and 2, owned respectively by the applicant and D. In October, 1882, D., who was then, and had been for the three previous years, a member of the township council, petitioned the council to pass a by-law closing up this portion of the road, and

procured E. and M., two of the council, to pledge themselves to support the by-law, in the belief that it was for the public benefit—D. agreeing to expend £100 on the side line, and on which it was voted to have the bulk of the statute labour performed—but on their discovering that it was against the public interest, they asked D. to release them from their pledge, which he refused to do. He, however, pretended that he was not anxious for the passage of the by-law, and petitioned the council representing that his land might be injuriously affected thereby, and asked to be heard by counsel; but as he wished, as he said, "to be let down easy," he arranged that E. should support the by-law, which D. said would be defeated. E. accordingly voted for it, as also did M., and another councillor, D. being absent, and the reeve not voting, and in consequence the by-law was carried. D.'s counsel, who was also counsel for the township, attended the council meeting and spoke in favour of the by-law. It appeared that D. had guaranteed the council against all expense in the matter. It also appeared that the applicant had some buildings on his lot adjoining the road, which were used by farmers and others, the approach to which would be cut off by the closing of the road:—Held, under the circumstances, the by-law must be quashed, with costs. *Howison v. The Corporation of the Township of Pembroke*, 6 O. R. 170.

Quære, whether several matters, each of which require the assent of the electors, can be enacted in one by-law, or whether there must be separate by-laws separately submitted to the electors. *Re Croome and the Municipal Council of the City of Brantford*, 6 O. R. 188.—Rose.

No seal in this case was affixed to the by-law, but an impression of the seal was made thereon:—Held sufficient. *Ib.*

Municipality estopped from denying the validity of by-law, which through inadvertence was not sealed or signed, for purchasing a road, which they dealt with as their own property, and subsequently passed a by-law divesting themselves of the road. See *Regina v. The Corporation of Perth*, 6 O. R. 195.

That a by-law purports to be for local improvement, and not for the general benefit of the municipality, does not affect the principle which prevents corporate powers from being exercised for the benefit of one individual at the cost of another. *Pell v. Boswell et al.*, 8 O. R. 680.—Boyd.

Per Burton, J. A.—Upon the evidence in this case the corporation intended by the by-law to remedy a private grievance, and upon that ground the by-law was bad. *Re Corporation of the Township of Romney and Corporation of the Township of Mersea*, 11 A. R. 712.

A by-law of the defendant corporation, providing for the delivery of debentures to a railway represented by the plaintiffs as a bonus to aid them in constructing their railway, having been adopted by a vote of the ratepayers on October 16th, 1873, was read a second and third time and passed by the council on October 20th, but was neither signed nor sealed, because a month had not elapsed from its first publication, the notice required by 36 Vict. c. 48, s. 231, sub-s. 3.



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## 2. Appointment of Officers.

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Where B. brought action against the township of S. to recover remuneration for medical services performed on the instructions of the corporation and of the board of health, and it was objected that the by-law purporting to appoint the board of health was invalid by reason of the fact that it merely purported to appoint three persons to be a board of health, but did not make any mention of the officers who by 47 Vict. c. 38, s. 12, sub-s. 2, are made ex-officio members of the board of health, and because it did not specifically state the three individuals named to be ratepayers:—Held, that looking at the provisions of the said statute, and considering that the attack now made upon the by-law was not by motion to quash it or of a like character, the objections could not be allowed to prevail. *Id.*

### 3. *Promulgation.*

By a by-law to grant aid to plaintiff's railway a dominion railway—the debentures were made payable more than twenty years from the by-law taking effect, and which the plaintiffs were only to be entitled to on the certificate of the engineer, that the rails had been laid on the line of railway and the first locomotive had passed thereon through the municipality; and no interest was to be payable until the locomotive had so passed and the debentures handed over. The vote for and against the by-law was equal, and the clerk, who was also returning officer, gave a casting vote in favour of the by-law and returned it to the council as carried by a majority, and it was finally passed by the council. The by-law was subsequently promulgated. The notice of promulgation was not authorized by resolution of the council; and it did not appear whether there was any resolution designating the paper in which the resolution was published; but the paper was the one usually employed by the council, and the account therefor was passed and paid by the council. The by-law came into force on the 1st March, 1880. On 24th July, 1882, the council passed a resolution revoking it. The by-law was acted upon by the plaintiffs, stations built, &c. :—Held, that promulgation validates any defect in form or substance in the by-law or in the time or manner of passing it; and therefore cured the defect in the by-law in making the debentures payable after the twenty years which was one of form; but that it does not give jurisdiction; and therefore would not cure the error, if such were the case, in passing the by-law without the required majority of votes; but there was a majority, as the clerk had the right to vote under ss. 155, 299 :—Held, also, that under the circumstances the gift was not revocable, and therefore there was no power to repeal the by-law :—Held, also, that s. 319, as amended by 42 Vict. c. 31, s. 9 (Ont.), does not require a resolution for promulgation; but merely that the paper in which the notice is to be published should be designated by resolution; and that there was sufficient publication here. An objection was raised that the terms of the by-law on which the debentures were to issue had not been complied with; but—Held, that the decision thereon rested with the engineer, and he had given his certificate; but if it was necessary to decide this question, the evidence shewed that the terms had been substantially complied with.



l Court. *In re the Township of Connor.*

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p. 448; *Re Milloy the Township of Re Workman and Lindsay, 7 O. R. e Corporation of y, p. 462; Scott v. A. R. 233, p. 453.*

## ND DUTIES.

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their contract. The declaration also contained the common counts, part of the work having been performed. By the terms of the contract the building, when erected, would not have conformed to the provisions of a by-law of the city passed (under authority of an Act of the General Assembly of New Brunswick, 41 Vict. c. 7) two days after the contract was signed. On the trial of the action the plaintiffs were non-suited, and an application to the Supreme Court of New Brunswick to set such non-suit aside was refused:—Held, Henry, J., dissenting, that the by-law of the said city of St. John made the said contract illegal, and, therefore, the plaintiffs could not recover. *Walker v. McMillan, 6 S. C. R. 241, followed.* Per Henry, J.—That the erection of the building would not, so far as the evidence showed, be a violation of the by-law, and, therefore, the nonsuit would be set aside and a new trial ordered. *Spears v. Walker, 11 S. C. R. 113.*

### 4. Drainage of Lands.

#### (a) EASEMENT.

A by-law was passed by the township of Mersea, providing for the drainage of lands in Mersea and Romney, and assessing property owners in both townships:—Held, that the by-law was invalid because the petition therefor did not describe the property to be benefited, and the by-law itself, which did shew the property to be benefited, disclosed that the petitioners were not the majority of the owners of such property. *Re Corporation of the Township of Romney and Corporation of the Township of Mersea, 11 A. R. 712.*

#### (b) ASSESSMENT.

A by-law passed for raising the unpaid portion of the expense of cleaning out and repairing a drain, otherwise good on its face, was objected to on the ground that while the resolution and by-law authorizing the work to be done were for such cleaning and repairing only, the work actually done included deepening, which it was contended could only be done by petition therefor under sec. 570 of the Municipal Act. It appeared that the drain, if deepened, which was not free from doubt, was done accidentally, and not by design. Under these circumstances, the objection being without merits and as much inconvenience would ensue if the by-law was quashed, an application therefor was refused; but apart from this:—Quære, whether under secs. 570, 589, of the Municipal Act, 1883, and 45 Vict. c. 26, s. 17 (Ont.), the municipality had not power without petition to do such work, including deepening, as might be incidental to maintaining the drain in an efficient state. A further objection that the assessment was altered without notice, and without affording an opportunity to appeal was disallowed, the evidence failing to establish any such alteration. *Begg v. The Corporation of the Township of Southwold, 6 O. R. 184.—Rose.*

In a drainage by-law the assessments as made by the engineer, contained in the schedule to this by-law, were revised by the Court of Revision, and alterations made, but the by law was not amended before being finally passed so as to correspond with such alterations as required by

sec. 571, sub-s. 2 of the Municipal Act of 1883, and it was impossible to discover from the alterations as made the amount of the "total special rate" against each lot or part of lot, and therefore the amount to be annually levied, to be ascertained by dividing such total special rate by the number of years the by-law has to run, which in this case was fifteen years:—Held, that the defect was fatal to the by-law. The locus standi of the applicant herein was objected to, but on the evidence, the objection was overruled. *In re Fauston and The Corporation of the Township of Tilbury East, 11 O. R. 74.—O'Connor.*

See *In re Clark and the Municipality of the Township of Howard, 9 O. R. 576, infra; Corporation of Dorset v. Corporation of Chatham, 11 A. R. 248, p. 468.*

#### (c) Other Cases.

A by-law which varies from the provisions of a statute in matters affecting the rights of property and of taxation is invalid. A by-law therefore defining the duties of inspectors of drains and enacting (1) That obstructions wilfully placed in drains should be removed by the parties placing them there or at their expense, without regard to whether such parties owned the lands through or between which such drains were situate; (2) That if such obstructions were removed by the council the cost should, on completion of the work, be paid by the council, instead of enacting that it should be so paid only in the event of the party chargeable with the obstruction failing to do so; (3) That if paid by the council the amount of such cost should be charged on the collector's roll against the lands of the party chargeable, instead of only against the party himself; (4) Because no appeal was provided for against such charging of such cost upon the collector's roll, was quashed with costs. *In re Clark and the Municipality of the Township of Howard, 9 O. R. 576.—O'Connor.*

On the petition of the plaintiff and other ratepayers in the township of Raleigh, the municipal council passed a by-law for the construction of the Kersey drain and the assessment of the lands which would be benefited thereby, amongst others those of the plaintiff; and in pursuance of such by-law the amount estimated to be requisite for the execution of the work was raised by such assessment. After the drain had been constructed and accepted by the council from the contractors as completed, a balance remained in the hands of the municipality of about \$2,000, which, in compliance with a petition presented by the plaintiff and other contributors to the fund, was refunded ratably to them. The plaintiff had himself been allotted a section of the work for construction, and had been paid therefor, although he had not fully carried out his contract. Subsequently, and after the defendants had so disbursed the full amount of such assessment, the plaintiff claimed to have discovered that the drain had not been properly constructed according to the plans, specifications, and profiles of the engineer employed to lay out the same, and sought on behalf of himself and other ratepayers to compel the municipality to complete the drain according to such plans, &c.:—Held, reversing the judgment of Ferguson, J., that the plaintiff being himself a defaulter in the

performance of his contract and having been a party to procuring a distribution of the surplus of the fund which otherwise might have been devoted to attaining the object sought by him, could not require the council to execute work which they had not the means to pay for. *Dillon v. Township of Raleigh*, 13 A. R. 53.

Sections 570, 574, 584, 587, 589, 592 of the Municipal Act 46 Vic. ch. 18 (Ont.), relating to the powers of municipal councils as to drainage, &c., considered and explained. *Ib.*

Reference to arbitration. See Sub-head X., p. 465.

#### 5. Sewers.

A municipal corporation passed a by-law for the construction of a sewer without limiting the purposes for which it was to be used, and subsequently passed another by-law regulating how it might be tapped for drainage purposes, and enacting that no one should drain into it without permission from the municipal council first obtained, and specifying a certain rate of payment for the use of it when so permitted. The applicant got no leave from the council or any committee thereof to use the sewer, but several members of the council gave him permission to connect some waterclosets with it on condition of his paying, whenever called upon, whatever was reasonable for the privilege:—Held, that the sewer was constructed for general drainage purposes, including that of waterclosets; but that the permission given to the applicant so to use it did not bind the council, which could compel him to cut off the connection, as he had not obtained their consent to make the same, nor paid the rate fixed by the by-law; and that the fact of his having enjoyed the privilege for several years did not place him in any better position than he was at the first:—*Semle*, that even if he had the legal right to use the sewer, either the corporation or the local board of health could, upon the facts stated in the report, under 47 Vict. c. 32, s. 13, and c. 38, s. 12, have passed a by-law compelling him to cut off his connection:—*Quære*, whether after the formation of the local board of health the by-laws provided for by 47 Vict. c. 32, s. 13, should be passed by the corporation or by the board of health under c. 38, s. 12. The motion to quash the by-law was therefore refused, but without costs, as the applicant had been led into his position by the indiscretion of certain members of the corporation. *In re Workman and The Corporation of the Town of Lindsay*, 7 O. R. 425.—*Rose*.

Sewer rates charged under the by-law 468 of the city of Toronto prior to the coming into force of 42 Vict. c. 31, sec. 25 (Ont.), March 11th, 1879, form a personal charge only, the said enactment not being retrospective. *Re Armstrong*, 12 O. R. 457.—*Boyd*.

#### 6. Bonus to Manufacturers.

The plaintiffs under a by-law granted the defendant a bonus of \$20,000 to aid him in the manufacture of steam fire engines and agricultural implements, subject to a condition in the by-law that he should give a mortgage on the factory premises for \$10,000, and a bond for

\$10,000, to be conditioned: (1) for the carrying on of such manufactures for twenty years; (2) during that period to keep \$30,000 invested in the factory; and (3) to insure the building and plant in plaintiffs' favour for \$10,000. The defendant gave the bond and mortgage, the latter containing a covenant for insurance, and he invested the \$30,000 as stipulated for. He also made a further mortgage on the premises to the plaintiffs for \$3,000 not mentioned in the by-law. The factory was one in which eighteen to twenty-five men might have been employed, and which could have turned out one hundred mowers in a year. In the course of two years only twenty mowers were constructed, and the number of persons employed dwindled down from eighteen or twenty to two or three:—Held, affirming the judgment of *Pondfoot, J.*, 4 O. R. 1, that the performance contemplated by the parties, of the contract to carry on manufactures was one reasonably commensurate with the capabilities of the factory; and that, upon the evidence, the defendant had failed in the performance:—Held, also, that the \$10,000 mortgage was given as a security for any damages the plaintiffs might sustain by the defendant's default, to an extent not greater than \$10,000, and not as a charge for that specific sum:—Held, also, that as the \$3,000 mortgage was not authorized by the by-law, as to it the plaintiffs were not entitled to any relief. Remarks upon elements to be considered by the Master in assessing plaintiffs' damages. *Corporation of the Village of Brussels v. Ronald*, 11 A. R. 605.

#### 7. Exemption of Manufactories from Taxation.

C. applied to the corporation of the town of Meaford for a lease of a certain lot of land owned by the corporation, alleging that he and others proposed to erect thereon a mill and other buildings for the purpose of carrying on the business of a flour and grist mill, and a general grain business; they petitioned also for exemption from taxation upon the mill for ten years. Under a by-law passed the 4th of March, 1885, a lease to the applicants was executed by the corporation of the lot in question for twenty-one years, reserving a nominal rent, and containing covenants on the part of the lessees in reference to the nature of the buildings to be erected, to pay taxes and other provisions. Another by-law was subsequently passed exempting the "manufacturing establishment of C. and others (naming them), established for the purpose of carrying on the milling and grain merchant business, including the lands leased, &c., and the mill and all buildings and property to be erected and placed upon the said land for the purpose of the said business," subject to the performance by the lessees of the stipulations in the lease as to maintaining and working the mill. Upon the faith of this by-law and lease, C. and others, the lessees, purchased a large amount of material, and entered into building contracts for the purpose of erecting the proposed mill, and proceeded to erect the same, and further contracted for the purchase of machinery, the whole involving an outlay, as was alleged, of some \$17,000. Upon the 20th of July following the council by by-law repealed the by-law exempting from taxation. Upon an application by C. and others, to quash the repealing by-law, upon the ground that the same was

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for the carrying twenty years; (2) £10,000 invested in the building and £10,000. The damage, the latter annoyed, and he injured for. He also premises to the in the by-law. Between twenty-five and thirty mowers in a year only twenty the number of men from eighteen held, affirming the fact, that the perquisites of the corporation was one responsibility of the defence:—Held, also, given as a security might sustain to an extent not as a charge for so, that as was authorized by the by-law, not entitled to be confessing plaintiffs' village of Brussels

#### from Taxation.

of the town of not of land owned at he and others and other buildings on the business general grain business exemption from years. Under a 1885, a lease to the corporation by one year, remaining covenants reference to the erected, to pay other by-law was the "manufacturers" (naming them), carrying on the business, including mill and all buildings placed upon of the said business by the lessees as maintaining the faith of this the lessees, puratorial, and entered purpose of erected to erect the for the purchase an outlay, as Upon the 20th of by-law repealed tion. Upon a quash the repeal that the same was

a fraud upon the applicants and a breach of contract, it appeared that there were other tax payers of the same town engaged in the same business, and having large amounts of capital invested therein, whose interests were injuriously affected by the repealed by-law:—Held (1) that inasmuch as the applicants were treated in the lease and by-law as carrying on two distinct kinds of business, viz.: the manufacturing or milling business, and the general grain merchant business, the first only of which the council had power to exempt from taxation, the by-law exempting from taxation was bad (2) that the by-law was also bad in exempting all the land leased, and not the mill only, from taxation, as other buildings, suitable alone for the grain business, might be erected thereon (3) the fact that other large milling establishments within the same municipality were discriminated against also made the by-law illegal and bad (4) the repealed by-law being therefore illegal, the council had a right to repeal, or to go through the form of repealing it in order to prevent trouble and expense. *The People's Milling Company and The Council of Mayford*, 10 O. R. 405.—O'Connor.

The Municipal Act of 1883, s. 368, as amended by 47 Vict. c. 32, s. 8 (Ont.), authorizes a municipal council to exempt "any manufacturing establishment, in whole or in part, from taxation for any period not longer than ten years." A by-law of the town of P. recited that a company had acquired several water privileges on the river O., and intended developing same by erecting thereon factories of different descriptions; and it was advisable in the interests of the town that the privileges, immunities and exemptions thereafter mentioned should be granted. It further recited that the total assessment of the said water privileges and the lands in connection therewith amounted to \$50,000. The by-law then enacted that the aggregate assessment of the said properties should be and remain for ten years at the sum of \$50,000; and the assessors from time to time were required to assess the same at said sum, notwithstanding the erection of any buildings thereon:—Held, not a by-law within the said section as amended; and also that it was opposed to public policy and morality in directing the assessors from time to time to limit their assessment. *In re Denne and the Corporation of the Town of Peterborough*, 10 O. R. 767.—O'Connor.

A by-law valid on its face was passed by a municipal corporation with the prescribed formalities under 47 Vict. c. 32, s. 8, (Ont.), for exempting the manufacturing establishments of one T. for the period of ten years. At the time of its passing some negotiations had taken place between the Canada Southern Railway and the authorities of the corporation for the construction of a spur or switch from their railway into the town. It was proposed on the part of the railway that the town should furnish the right of way and contribute \$1,800 towards the construction, involving, as it was stated, an expenditure of over \$6,000. The council being unwilling to submit a by-law to the people, T., the largest ratepayer in the town, suggested that if his manufacturing establishments were exempted from taxation for ten years, the taxes thereon amounting to about \$280 a year, he would himself furnish the right of way and construct the

switch. The by-law was accordingly passed upon this understanding, and T. proceeded with and completed the work:—Held, affirming the judgment of the court below, (10 O. R. 119.) Burton, J. A., dissenting, that the by-law was an evasion of the statute, and therefore illegal and void:—Per Burton, J. A.—That the building of the switch in question was an extension or improvement of the manufacturing establishments of T., not dissimilar in principle from that which is usually looked for, (where exemptions of this kind are granted,) viz., the expenditure of the taxes in the increase of the manufactory, differing only in this, that the benefit was not confined to his own establishments; that as the exemption might have been granted *mero motu* of the council, the mere circumstance that the manufacturer agreed to make an improvement, which was a public as well as an individual benefit to himself and his own manufactories, could not invalidate it; that the case was not brought within the sections giving power to the courts summarily to quash; and that even if the courts had power to deal with the question summarily it was a case in which in the exercise of discretion it should not be exercised after the work had been completed; and—Quere, whether the proper course would not have been to apply for an injunction. *Scott v. Corporation of Tilsonburg*, 13 A. R. 233.

#### 9. Hawkers, Petty Chapmen, and Traders Agents.

The defendant, who was a traveller for a tea dealer, carried samples with him from house to house, and took orders for tea, which orders he forwarded to his employer, who sent the tea to him. The defendant then got the tea which had been forwarded in packages, and delivered it to his customers, receiving the price on delivery. On this evidence he was convicted of selling tea as a pedlar without a license, contrary to a by-law which prohibited "hawkers or petty chapmen and other persons carrying on petty trades," from selling goods in the manner pointed out by the Consolidated Municipal Act, 1883, s. 495 (3):—Held, that the defendant was not a "hawker," nor was the word pedlar used in the Act, and if he was a "petty chapman or person carrying on a petty trade," the conviction could not be supported, for he was "not carrying goods for sale." *Regina v. Counts*, 5 O. R. 644.—Rose.

Held, also, that a municipality cannot pass a by-law prohibiting unlicensed traders from sending out agents to take orders from private persons for goods, and subsequently delivering the goods. *Ib.*

"The Consolidated Municipal Act, 1883," (46 Vict. c. 18), s. 495, sub-s. 3, empowered the council of any county to pass by-laws for licensing, &c., hawkers, &c., going from place to place, &c., with any goods, wares, or merchandise for sale, and by 48 Vict. c. 40, s. 1 (Ont.), the word "hawkers" shall include all persons who, being agents for non-residents of the county, sell or offer for sale tea, dry goods, or jewelry, or carry and expose samples of any such goods to be afterwards delivered, &c.:—Held, that electrotype ware was not jewelry within the above enactment, and a conviction for selling this without license was therefore bad, and in this case was quashed, though the fine imposed had been paid:—Held,

also, that the words "other goods, wares, and merchandise," in the conviction, were too general. *Regina v. Chayler*, 11 O. R. 217.—Wilson.

The defendant was convicted of selling and delivering teas as the agent of P. W., a non-resident of the county, in violation of a by-law of the county of Bruce, the third section of which was a copy of section 1 of 48 Vict. c. 40 (Ont.) The defendant, against the protest of his counsel, was called as a witness and swore that he bought the tea in question from one W. of the city of London, and that he did not sell as the latter's agent, but on his own account: that he had formerly sold tea on commission for W., but purchased that in question for the purpose of evading the by-law. The conviction alleged that defendant was the agent of P. W., but did not state that he had not the necessary license to entitle him to do the act complained of:—Held, 1. That defendant being, under the evidence, an independent trader, and not an agent, did not come within the Consolidated Municipal Act, 1883, s. 495, sub-s. 3, nor within 48 Vict. c. 40 (Ont.) 2. That the conviction was defective in not stating that P. W. was non-resident within the county, and that the expression "of the city of London" was not sufficient. 3. That defendant had been improperly compelled to give evidence against himself. 4. That the having a license is a matter of defence, and not of proof by the prosecution. 5. That the intention to evade the by-law was immaterial so long as the agency did not in fact exist. *Regina v. McNichol*, 11 O. R. 659.—Wilson.

Held, that under 48 Vict. c. 40, s. 1 (Ont.), amending sub-s. 3 of s. 495 of Con. Mun. Act, 1883, it is no offence to expose samples of cloth and solicit orders for clothing to be afterwards manufactured from such cloth, and to be then delivered to the persons giving such orders:—Held, also, that the term "dry goods," in the amended Act does not include clothing ordered to be manufactured from cloths, samples of which are exposed with a view to solicit orders for such clothing. *Regina v. Bassett*, 12 O. R. 51.—Galt.

Held, that under 48 Vict. c. 40, s. 1 (Ont.), amending sub-s. 3 of s. 495, of the Consolidated Municipal Act, 1883, a member of a firm carrying and exposing samples, or making sales of tea, &c., is not within the restriction preventing "agents for persons not resident within the county" from so doing, and is not such an agent. *Regina v. Marshall*, 12 O. R. 55.—Galt.

#### 10. Markets.

A by-law required "all hay, &c., sold at the market or elsewhere in the town of Cornwall, which is required to be weighed by the vendor or purchaser, to be weighed with public weigh scales," &c. A conviction under this by-law was, that defendant, in contravention of said by-law, brought hay into said town, and had same weighed on scales other than the public scales:—Held, that the conviction was bad in not stating that the hay was sold at the market or elsewhere in said town, and must be quashed: and with costs to be paid by complainant the weigh-master, who had instituted the prosecution for his own benefit, after warning, instead of bring-

ing an action in the Division Court. *Regina v. Hollister*, 8 O. R. 750.—Rose.

A by-law of the city of Ottawa set apart certain sections of the city, six in number, as markets or market places. Four of these sections were called meat, produce, and fish markets, though in the enumeration of the articles for the sale of which the markets were established, fish were not named. Section 5 of Art. IV. declared that all produce, provisions, or articles of any kind brought to any of the meat, fish, and produce markets and exposed for sale, should be placed in boxes and exposed in carts or other vehicles, which should be placed upon said markets under the direction of the market inspector. Any person refusing to comply therewith, or to remove such articles, vehicles, or boxes after selling their contents, should be subject to the penalty imposed by the by-law, and liable to expulsion from the market. Section 1 of Art. IX. declared that no person should sell any fresh fish elsewhere than in such places as should be allotted and designated by the standing committee on markets, in any of the aforesaid markets. Section 1 of Art. X. declared that the vendors of any articles in respect of which a market fee might, under the Municipal Act, be imposed, might lawfully without paying market fees, offer for sale any such articles at any place within the city excepting the market places thereof. The by-law was a consolidation of previously existing by-laws passed from time to time. It appeared that many years ago certain stalls in each market were set apart as fish markets; that no application was ever made for standing room for carts or other vehicles from which to sell fish; and no provision made by the council for so bringing fresh fish to the market:—Held, that s. 5 of Art. IV., though wide enough to cover fresh fish, would appear not to have been framed with reference to it; and that reading s. 1 of Art. IX. and s. 1 of Art. X., together, they could be reconciled by construing them as providing that fresh fish might be sold in stalls and nowhere else in the markets, but outside of the markets no restriction should be placed on selling. *Re Borthwick and the Corporation of the City of Ottawa*, 9 O. R. 114.—Rose.

Held, that a by-law passed pursuant to sub-s. 6 of s. 503 of the Consolidated Municipal Act, 1883, for granting licenses and regulating the sale of fresh meat in quantities less than by the quarter carcase, and the conviction thereunder, were not bad because the by-law did not embody or refer to the exceptional proviso as to time mentioned in s. 500; for that s. 500 did not refer to the subject of sub-s. 6 of s. 503; and that apart from that, s. 500 was expressly limited to municipalities wherein no market fees were imposed or charged, whereas here a by-law was in existence imposing such fees and charges:—Held, also, that the by-law was not ultra vires, express power being given by s. 503 to pass a by-law respecting the matters mentioned in sub-s. 6; and that as the reasonable or unreasonable exercise of the power could only be considered on a motion to quash the by-law, the objection was not open on this motion, which was to quash the conviction. But,—Held, that the conviction was bad, because, while covering two several and distinct offences under the same by-law, it imposed only one penalty. *Regina v. Gravelle*, 10 O. R. 735.—O'Connor.



Court. *Regina v.*

awa set apart certain number, as Four of these sections, and fish market of the articles were established by section 5 of Art. IV. provisions, or articles the meat, fish, and for sale, should be in carts or other vessel upon said market inspector. y therewith, or to boxes after be subject to the law, and liable to Section 1 of Art. should sell any fresh places as should be the standing com the aforesaid market declared that the respect of which a Municipal Act, be out paying market articles at any place the market places consolidation of pressed from time years ago certain apart as fish market as ever made for other vehicles from vision made by the fish to the market: IV., though wide could appear not to be to it; and that 1 of Art. X., to be sold in the markets, but restriction should be *and the Corporation* O. R. 114.—Rose.

pursuant to sub-s. and Municipal Act, and regulating the less than by the restriction thereunder, law did not embody proviso as to time s. 500 did not refer s. 503; and that expressly limited to market fees were incurred by a by-law was in and charges:—as not ultra vires, y s. 503 to pass a mentioned in sub-section or unreasonable only be considered law, the objection n, which was to —Held, that the while covering two under the same by-nalty. *Regina v.* nor.

Sub-s. 2 of s. 8 of 45 Vict. c. 24, subjects "such vendors of articles in respect of which a market fee may be now imposed as shall voluntarily use the market place for the purpose of selling such articles," whereas the 12th section of the by-law in question was, "any person or persons who shall voluntarily come upon the said market place, &c., for the purpose of selling," &c.:—Held, that "vendors, who shall voluntarily use the market place for the purpose of selling" was not identical with or equivalent to "any person or persons who shall voluntarily come upon the said market place for the purpose of selling;" nor was the expression "use the market place for the purpose of selling" the same as "come upon the market place for the purpose of selling;" and that the conviction was bad on this ground also:—Held, also, that the conviction was bad, as differing from both statute and by-law, being for refusing to pay the fees on eight quarters of beef "exposed for sale," whereas, the 13th section of the by-law applied only to cases of butcher's meat exposed for sale. *Regina v. Reid*, 11 O. R. 242.—O'Connor.

By sec. 503 of the Municipal Act, 1883, the council may, subject to the restrictions and exceptions contained in the six next preceding sections, pass by-laws as provided by the following sub-secs.: "(1) For establishing markets; (2) for regulating markets," &c.; "(3) for preventing or regulating the sale by retail on the public streets or vacant lots," &c.; "of any meat," &c.; (4) for preventing or regulating the buying and selling of articles or animals exposed for sale or marketed; "(5) for regulating the place and manner of selling and weighing grain, meat \* \* and all other articles exposed for sale, and the fees to be paid therefor," &c.; "(6) for granting annually or oftener licenses for the sale of fresh meat in quantities less than by the quarter carcase, and for regulating such sale, and fixing and regulating the places where such sale shall be allowed, and for imposing a license fee \* \* and for preventing the sale of fresh meat in quantities less than by the quarter carcase unless by a person holding a valid license, and in a place authorized by the council," &c. The restrictions and exceptions, so far as applicable, were those contained in sub-secs. 4 and 6 of sec. 497. Sec. 4 applied to articles for sale brought into the municipality after 10 A.M., upon which market fees are not to be imposed unless they are offered for sale on the market; and sec. 6 applied to those persons who go to the market place before 9 A.M., between 1st April and 1st November, and 10 A.M., between 1st November and 1st April, with any article they may sell on the market place; and with regard to such persons that after these respective hours they shall not be compelled to remain on the market place, but may proceed to sell elsewhere on paying the market fee:—Held, that a by-law passed under sub-sec. 6, need not be made subject to such restrictions, &c., the proper construction of the section being that sec. 503 is made subject to such restrictions so far as properly applicable, and that sub-sec. 6 is in the nature of an exception from these general restrictions, &c.:—Semble, that the court might quash a by-law of this description when plainly insufficient accommodation is furnished, unless in the alternative the municipality should provide reasonably fit and full accommodation; but as a rule the municipality is the judge of its own

business and affairs, and it is probably an extreme case in which the court would interfere. *Re O'Meara and The Corporation of the City of Ottawa*, 11 O. R. 603.—Wilson.—Affirmed by Court of Appeal, 23 C. L. J. 235. See 50 Vict. c. 29, s. 29.

# 11. Animals Running at Large.

By-law No. 84, passed by the township of Onondaga on 29th May, 1882, prohibited certain animals therein named running at large; and provided that, *except between the 10th May and the 1st December in any year*, it should not be lawful for the owners of any other animals, not theretofore mentioned or indicated, to allow or permit the same to run at large. A fine or penalty not exceeding \$5.00 was imposed for every offence, but the animals were not thereby to be relieved from the operation of any by-law relating to pounds or pound keepers, or for any trespass or damage committed or done by them through their being permitted to run at large. The recovery of fines and penalties, (not adding the words "and costs,") was directed to be under sec. 421, et seq., of the Summary Convictions Act, with imprisonment, in the event of no distress, unless the fine or penalty and costs, including costs of committal, be sooner paid. By-law No. 97, passed on 9th July, 1883, after reciting that the object was to prevent all animals of any age or description running at large at all seasons of the year, amended by-law No. 84, by striking out the words in italics:—Held, that the by-law was not oppressive or unreasonable as extending to all seasons of the year, in that it was no wider than the statute under which it was passed. Municipal Act, 1883, s. 492, sub-s. 2. *Re Milroy and the Municipal Council of the Township of Onondaga*, 6 O. R. 573.—Rose.

It was objected that the provisions in by-law 84 as to the levying fines was ultra vires, because s. 492, sub-s. 2, of the Municipal Act provided a mode of recovery, i. e., by sale of the animals impounded, and hence that sec. 421, et seq., did not apply; But—Held, that the objection was taken under a misconception of fact, in that the by-law was not and did not profess to be a pound by-law; and it was by no means clear that these sections would not apply to a pound by-law:—Quære, as to the effect of the omission of the words "and costs" in the clause of the by-law providing for the penalty; but as this was not taken in the rule it was not considered. *Id.*

It was also objected that the by-law should have been limited in its provisions so as not to extend to Indian lands within the township, but the learned Judge refused to quash on this ground: (1) because the quashing a by-law is not imperative but discretionary; (2) and if it were quashed the original by-law would remain; (3) it could only be quashed as to Indians and Indian lands; (4) the applicant was not prejudiced, and this was not a substantial objection; and (5) the Indians, who were alone affected, were not complaining. *Id.*

Sheep grazing on private unenclosed property in charge of a boy:—Held, not to be "running at large." *Ibbotson v. Henry*, 8 O. R. 625.—Q. B. D.

## 12. Noises.

47 Vic. c. 32, s. 13, sub-s. 12 (Ont.) enacts that by-laws may be passed "for regulating or preventing the ringing of bells, blowing of horns, shouting and other unusual noises, or noises calculated to disturb the inhabitants," &c. Sec. 2 of by-law No. 179 of the city of London, passed under that Act, is as follows: "No person shall, in any of the streets, or in the market place of the city of London, blow any horn, ring any bell, beat any drum, play any flute, pipe, or other musical instrument, or shout or make, or assist in making, any unusual noise, or noise calculated to disturb the inhabitants of the said city." Provided always, that nothing herein contained shall prevent the playing of musical instruments by any military band of Her Majesty's regular army, or any branch thereof, or of any militia corps lawfully organized under the laws of Canada. The prisoner was convicted under the by-law of beating a drum on a public street in the city of London:—Held, that the by-law so far as it sought to prohibit the beating of drums simply, without evidence of the noise being unusual, or calculated to disturb was ultra vires, and invalid, and that the refusal to receive evidence on the prisoner's behalf was a valid ground for her discharge. Held, also, that the above proviso was not an exception that must be negatived in either the commitment or conviction. *Regina v. Nunn*, 10 P. R. 395.—Rose.

See *Regina v. Martin*, 12 O. R. 800, p. 386.

## 13. Cab Stands.

Where it was admitted that a by-law was within the powers of a municipal council under sub-s 46, s. 96 of the Municipal Act, 1883, "for authorizing and for assigning stands for vehicles kept for hire on the public streets and places," &c., the court refused to quash the by-law on the ground, alleged by the applicant, that the stand interfered with the view of the falls from the hotel in question; that the manure on the stand was offensive, and the noise of the hackmen a nuisance, these being matters of municipal regulation, and the aid of the court if successfully invoked, being an interference with the discretion of the municipal council, and especially so as the stand in question had been there for twelve years, and maintained under successive by-laws. *Colborne v. The Town of Niagara Falls*, 9 O. R. 168.—Rose.

## 14. Livery Stables.

The Municipal Act, 1883, s. 510, authorizes the licensing of owners of livery stables and of horses, &c., for hire. A by-law passed under this section required every person owning or keeping a livery stable or letting out horses, &c., for hire to pay a license fee. Defendant was convicted under this by-law for that "he did keep horses, &c., for hire" without having paid the license fee:—Held, that the conviction was in conformity with both statute and by-law. *Regina v. Seabwell*, 12 O. R. 391.—Wilson.

## VII. CONTRACTS BY AND WITH.

The financial affairs of a municipal corporation being in disorder a commissioner was appointed

by the Government to investigate them, and the plaintiffs, professional accountants, were employed by the council to examine and arrange the accounts. Resolutions were passed, not under seal, recognizing that the work was being done by the plaintiffs, who reported to, and were in communication with the council. Their report, as the learned judge found at the trial, was before the commissioner, and in a by-law one of the plaintiffs was referred to as "having re-written the books":—Held, Wilson, C. J., dissenting, that the plaintiffs could recover, though there was no by-law directing the work to be done, or appointing the plaintiffs to do it. *Silsby v. The Corporation of Dunnville*, 8 A. R. 524, and *Young v. The Corporation of Leamington*, 8 App. Cas. 577, distinguished. *Robins et al. v. Brockton*, 7 O. R. 481.—Q. B. D.

Agreement by town council with chief of police to pay over to them fees received by him from the county for services performed by him as county constable. See *The Corporation of the Town of Stratford v. Wilson*, 8 O. R. 104.

By a special Act of the legislature of Ontario, 45 Vict. c. 45, provision was made for the construction of a subway or subways as a means of crossing certain railways entering the city of Toronto, part of which had to be constructed within the city, and part within the adjoining municipality of the village of Parkdale, and in consequence of a disagreement between the city and the village as to the terms upon which the undertaking should be proceeded with, the latter united with the railway companies in obtaining an Order in Council under the Dominion Act, 46 Vict. c. 24, authorizing the companies to execute the work, and the latter entered into an agreement with the village authorities that they should construct the same, which they proceeded to do. In an action against the village brought by the holders of property in the city and village, which was greatly damaged by the mode of executing the work:—Held, reversing the judgment of the court below—Hagarty, C. J. O., dissenting—that the municipality was not answerable for any damage caused by the works. Per Hagarty, C. J. O.—The defendants could not legally undertake the work merely as the agent of the railway companies, and can only be treated as principals; the plaintiffs are entitled to a reference as to the compensation to be awarded to them. Per Burton, J. A.—When the council of a corporation professing to act under the authority of the corporation does acts which are injurious to others, if the objects and purposes which they propose to accomplish are not within the scope of the corporate duty imposed on it by law, the corporation is not liable. What the corporation attempted to do here was not to put in force any of the corporate powers of the municipal body, but the powers supposed to be possessed by the railway companies, and for this reason they are not liable. Per Osler, J. A.—If the defendants could act as agent of the railway companies they can defend themselves just as an individual could do under the authority of the railway Act and Order in Council; if they could not so act it is equally open to them to defend themselves from liability as a corporation, and either way the plaintiffs fail. *West v. The Corporation of the Village of Parkdale; Carroll et al. v. The Corporation of the Village of Parkdale*, 12 A. R. 393. Reversed on appeal to Privy Council.

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## VIII. ACTIONS AND PROCEEDINGS AGAINST.

## 1. Generally.

Where a municipal corporation issued debentures under authority of certain by-laws which required a sinking fund to be raised each year to provide for payment of the principal at maturity, but the corporation omitted to raise such sinking fund:—Held, that they should be compelled by mandamus, on the application of a debenture holder, to raise the sinking fund for the current years, and that proceedings were properly taken against the corporation, and not the clerk of the municipality, notwithstanding R. S. O. c. 180, s. 88. For that enactment must be taken in connection with 46 Vict. c. 18, s. 359, and the clerk is not to insert in the collector's roll any sums which the council has not directed to be levied:—Held, however, that the mandamus could not include the levy of the rate for a sinking fund in future years, nor:—Semble the levy of arrears. The not levying a rate for the sinking fund is an annual breach of duty, and upon any breach a right arises to have it corrected. *Clarke v. Corporation of the Town of Palmerston*, 6 O. R. 616.—Proudfoot.

Action by two ratepayers on behalf of themselves and all other ratepayers of A. against all the members of the Municipal Council of A., charging that the defendants acting fraudulently and in collusion with the treasurer of A., continued him in office after it had come to their knowledge that he was a defaulter, and allowed him to receive further moneys, causing loss to the municipality:—Held, that the law attaches the liability of trustees to municipal councillors, and that it was sufficient to charge them as such without using the word "trustees;" that the action was one in the former exclusive jurisdiction of the Court of Chancery, and a jury notice was therefore improper:—Semble, the municipal corporation should have been made a party to the action, and the action should have been on behalf of all ratepayers, except the defendants. *Morrow et al. v. Connor et al.*, 11 P. R. 423.—Proudfoot.

For injuries caused by streams, drains or water courses.—See WATER AND WATER COURSES.

For injuries on defective sidewalks or roads.—See WAY.

## X. MATTERS REFERRED TO ARBITRATION.

Quere, whether an award made by arbitrators pursuant to the Municipal Act, R. S. O. c. 174, is invalid though made more than a month after the appointment of the third arbitrator, notwithstanding s. 377 of the Act. *In re Arbitration between the Corporation of the Township of Muskoka and the Corporation of the Village of Gravenhurst*, 6 O. R. 352.—Cameron.

By s. 378 no member, officer, or person in the employment of a corporation interested in any arbitration, nor any person so interested, shall act as an arbitrator under the Act:—Semble, that a ratepayer was disqualified, and that the objection would not be waived by mere acquiescence. *Ib.* See 48 Vict. c. 39, s. 9.

By s. 383 the arbitrators are to file with the clerk of the council the notes of the evidence

taken. There being two councils interested in the arbitration, the arbitrators did not know with which clerk to file the evidence, and did not file it:—Held, that the award was not thereby invalidated. *Ib.*

The award having been directed to be made within a year by an order of the Chancery Division, where the parties were litigating concerning it:—Held, that the motion to set it aside or refer back on the above grounds, or on the merits, should have been made in that Division, and should be transferred. *Ib.*

A portion of a drain constructed by a township corporation having been dug on the plaintiff's land, an arbitration was had under the Municipal Act to ascertain the compensation plaintiff was entitled to by reason of the damage alleged to have been sustained by him: (1) for land taken for the drain; (2) for the throwing of earth on the land on the site of the drain; (3) the building of bridges by the plaintiff to cross the drain; and (4) the backing of water into the plaintiff's cellar. The arbitrators found that the plaintiff had not sustained any damage, and they made an award against him imposing on him a large portion of the costs:—Held, that the evidence sustained all the grounds of damage except the last, as to which the evidence was not very satisfactory. The learned judge was therefore of opinion that he could not ascertain the compensation himself, but set aside the award, and intimated that unless the parties would agree on new arbitrators, he was disposed to direct a reference to the county judge. *In re Hodgson and the Corporation of the Township of Bosanquet*, 11 O. R. 589.—Cameron.

A township by-law after reciting that there was a difficulty with S. "from alleged damage from water flowing from local drains known as the H. and S. drains," enacted that F. was appointed arbitrator for the township. The notice given by the reeve to S. was, that "the corporation has elected that the claims made by you for damages to the east half of lot 11," &c., "on account of the construction of the drain from P. to the S. drain, or consequent thereon, shall be referred to arbitration." Before the parties had been heard on the merits, the plaintiff's arbitrator withdrew from the arbitration and refused to act; but the other two arbitrators notwithstanding proceeded with the reference and made an award:—Held, that the reference was wholly informal, the subject thereof not being properly defined; and though the notice given by the reeve to S. would make the matter sufficiently clear it could not affect S. for he never entered upon the arbitration, but repudiated the arbitrator's authority at the first meeting of which he had notice; but even if the reference were sufficient, the award was bad by reason of the two arbitrators proceeding alone, the Municipal Act requiring (in the absence of a special agreement to refer) that there shall be three arbitrators continuing to act from the time of appointment until the award has been made, and enabling the County Court Judge to appoint another arbitrator in the place of one refusing or neglecting to act. *In re Smith and the Corporation of the Township of Plympton*, 12 O. R. 20.—Cameron.

Quere, whether it was in the power of either party to the reference to revoke the authority of the arbitrators. *Ib.*

Semble, that the provisions in the statute that the arbitrators must hold their first meeting within twenty days from the appointment of the last arbitrator is not imperative, but directory, merely; and therefore an omission to hold such meeting within such time would not invalidate an award made within the month as required by the Act. *Ib.*

Semble, also, that the County Judge may appoint the third arbitrator ex parte although this is not desirable; and that the power to appoint does not depend on the disagreement of the two arbitrators, but on their failure to agree within the seven days limited therefor. *Ib.*

It was objected that the arbitrators had not taken the oath required by the statute; but, Semble, this objection was not tenable, as the oath they took was substantially the same as that required. *Ib.*

Under the drainage clauses of the Municipal Act a by-law was passed by the township of Chatham, founded on the report, plans, and specifications of a surveyor to authorize the drainage of certain lands in that township. In order to obtain a sufficient fall it was necessary to continue the drain into the adjoining township of Dover. The surveyor assessed certain lots and roads in Dover, and also the town line between Dover and Chatham for part of the cost of the works in proportion to the benefit in his judgment derived by them therefrom. Dover appealed from the report on several grounds, and three arbitrators were appointed pursuant to the Act. At their last meeting they all agreed that the lands and roads in Dover were benefited by the work, but R. F., one of the arbitrators, thought \$500 should be taken off the town line. W. D., another of the arbitrators, was of opinion that while the bulk sum assessed was not too great, the assessment on lands and roads should be varied, but that this was for the Court of Revision to do. A memorandum to this effect was signed by W. D. and A. E., the third arbitrator, at the foot of which R. F. also signed a memorandum that he dissented and declined to be present at the adjourned meeting to sign the award "if in accordance with the above memoranda." Later, on the same day, the two arbitrators, W. D. and A. E., met and signed an award determining that the assessment on the lands and roads in Dover and the town line should be sustained and confirmed, and also that on the town line between Dover and Chatham:—Held (1) per Hagarty, C. J. O., and Osler, J. A., affirming the judgment of Cameron, C. J., 5 O. R. 325, that the award was bad (a) as formally sanctioning and confirming the particular assessments on lands and roads and the town line, instead of the aggregate amount assessed, the latter being the only award contemplated at the last meeting, at which all three arbitrators were present; (b) because one of the arbitrators had recorded his dissent from the adjustment or scheme of assessment, and yet by the award purported to sanction or affirm it. Per Burton and Patterson, J.J. A., contra, that the duty of the arbitrators was confined to ascertaining the correctness of the proportions payable by each township: that all other objections as to the amounts of the assessment were for the Court of Revision, and that the award did not substantially differ from the memorandum signed at the

last meeting of the arbitrators. *Essex v. Rochester*, 42 Q. B. 523, and *Thurlow v. Sidney*, 1 O. R. 249, commented on. *Corporation of Dover v. Corporation of Chatham*, 11 A. R. 248.

Held, (2) that the report of the surveyor, incorporated in the by-law, sufficiently shewed the termini of the proposed work, and that under the circumstances it was not open to the objections that it did not expressly state that the work was to be constructed at the expense of both townships and in what proportions, and that it determined, in apparent disregard of section 554, that the work was to be kept in repair by Chatham at the joint expense of Chatham and Dover. *Osler, J. A., dissenting. Ib.*

Held, (3) upon the true construction of the drainage sections of the Municipal Act, that when drainage works are extended and continued into an adjoining township beyond the limits of the township in which they are commenced, the roads in the former township and the town line are liable to be assessed in proportion to the benefits derived by them therefrom. *Osler, J. A., dissenting. Ib.*

See also *In re Laplaude and The Corporation of the Town of Peterborough*, 5 O. R. 634; *McArthur v. The Corporation of the Town of Collingwood*, 9 O. R. 368.

## MUTUAL INSURANCE COMPANY.

See INSURANCE.

## NAME.

Remarks as to the serious consequence likely to arise from the constant changes in the names of the streets in the city of Toronto. *Van Koughnet v. Denison*, 11 A. R. 699.

As a trade mark. See *Gaye v. Canada Publishing Co.*, 11 A. R. 402.

## NAVIGABLE WATERS.

See WATER AND WATER COURSES.

## NECESSARIES.

See HUSBAND AND WIFE.

## NEGLIGENCE.

### I. PARTIES LIABLE.

1. *Generally*, 469.
2. *Master for Injury to Servant*—See MASTER AND SERVANT.
3. *Medical Practitioners*—See MEDICAL PRACTITIONERS.
4. *Municipalities*—See WATER AND WATER COURSES—WAY.
5. *Railways*—See RAILWAYS AND RAILWAY COMPANIES.
6. *Solicitors*—See SOLICITOR.

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## II. CONTRIBUTORY NEGLIGENCE, 470.

## III. PROXIMATE CAUSE OF INJURY, 470.

## IV. CLEARING LAND—See FIRE.

## V. PLEADING IN ACTIONS FOR, 470.

## VI. DAMAGES RECOVERABLE.

1. *By Representatives of Persons Killed by Accident*, 470.

## VII. DELAY—See LACHES.

## VIII. NEW TRIAL IN ACTIONS FOR—See NEW TRIAL.

## I. PARTIES LIABLE.

1. *Generally*.

In an action for damages sustained by the plaintiff by reason of ice and snow falling from the roof of the defendant's house and injuring him while he was walking on the highway, evidence was given to shew that about half an hour before the accident happened the defendant was notified of the dangerous character of the roof, but took no precautions to guard against accidents, and a by-law of the municipality was proved requiring the citizens to keep their roofs clear of ice and snow:—Held, that there was evidence to go to the jury of negligence in the defendant. A nonsuit entered at the trial, was therefore set aside, and a new trial granted. *Lazarus v. Corporation of Toronto*, 19 Q. B. 9 commented on and distinguished. *Landreville v. Gouin*, 6 O. R. 455.—C. P. D.

The defendants' premises abutted on Clarence street in the city of Toronto. The defendants' placed a beam at the height of nine and a-half feet from the ground along the north limit of Clarence street, a street 28 feet in width, and hung a gate therefrom, and put up another gate across said street about 37 feet further south, the two gates not being exactly opposite to each other, nor of the same width. A lane ran north from Clarence street. There was an accumulation of rubbish with ice and snow under the beam, which raised up the front wheels, and the plaintiff, while driving along Clarence street to deliver goods to persons on the lane, was injured by being crushed between the beam and the load upon which he was seated. He said he knew of the beam, having driven there often, but that his attention was called from it by having to steer his way carefully between the two gates. Clarence street had not been adopted as a highway by by-law:—Held, that although by 45 Vict. c. 18, s. 545 (Ont.), the council is prohibited from laying out a road or street of less than 66 feet in width, they may consent to the owner of lands laying one out less in width, and that prior to the Act of 1873 the owner was not prohibited from laying out a road of any particular width; and that as Clarence street had been laid out and used as a public street for many years, having several large business establishments fronting upon it, or with a rear access to it, and public conveyances had used it for business purposes in all respects as a highway, it might in an action of this kind, between a person using it in the way of business, as it had so long been used, and one who was charged with obstructing it, be found to be a public highway:—Held, also, that the beam was the proximate

cause of the injury, not the ice and snow only, and that defendants were liable though the person who allowed the rubbish to thus accumulate might be liable also:—Held, also, that there was no contributory negligence on the part of the plaintiff. *Bliss v. Boeckh et al.*, 8 O. R. 451.—Q. B. D.

In an action for negligently towing a ship. See *Sevell et al. v. British Columbia Towing and Transportation Co et al.*, 9 S. C. R. 527.

Liability of architect. See *Budgley v. Dickson*, 13 A. R. 494.

See *Reynolds v. Roxburgh*, 10 O. R. 649, p. 305.

## II. CONTRIBUTORY NEGLIGENCE.

See *Bliss v. Boeckh et al.*, 8 O. R. 451 *supra*; *Millev. Reid*, 10 O. R. 419, p. 426. See also *Beckett v. Grand Trunk R. W. Co.*, 8 O. R. 601; *Copeland v. The Corporation of the Village of Blenheim*, 9 O. R. 19; *Ryan v. The Canada Southern R. W. Co.*, 10 O. R. 745; *McLauchlin v. The Grand Trunk R. W. Co.*, 12 O. R. 418; *The Town of Portland v. Griffith*, 11 S. C. R. 333.

## III. PROXIMATE CAUSE OF INJURY.

See *Bliss v. Boeckh et al.*, 8 O. R. 451, *supra*. See also *Duck et al. v. The Corporation of the City of Toronto*, 5 O. R. 295.

## V. PLEADING IN ACTIONS FOR.

Statement of claim claiming damages for an accident to the plaintiff by his stepping upon the covering or lid of a manhole in the sidewalk alleged to be defective, &c., through defendant's negligence. By the first paragraph of the statement of defence defendants denied the correctness of the statements contained in the statement of claim; and by the second paragraph set up that defendants had no notice or knowledge of the defect:—Held, on demurrer to the second paragraph, that the whole statement of defence must be read together; and that the second paragraph taken with the first constituted a good defence or was immaterial; that it could not embarrass the plaintiff, for if he proved actionable negligence he must prove either actionable or presumptive notice. *Beasley v. The Corporation of the City of Hamilton*, 9 O. R. 112.—Rose.

In an action for damages for negligence a counter-claim for libel was excluded. See *McLean v. Hamilton Street Railway Co.*, 11 P. R. 193.

## VI. DAMAGES RECOVERABLE.

1. *By Representatives of Persons Killed by Accident*.

The deceased had effected a policy of insurance on his life which was in force at the time of his death. At the trial the jury were directed to deduct the amount of the policy from the verdict, which amount was afterwards added by the Divisional Court. On appeal this Court being equally divided in opinion on this branch of the case, the appeal was dismissed, with costs. *Hagarty, C. J. O.*, and *Osler, J. A.*, were of opinion that the actual loss or injury resulting

from the death, can alone be recovered in such a case, and if a large increase of fortune occurs to the parties as a result of such death, or property, or money falls to them as a like result whether under a settlement or in the shape of a life insurance effected for their benefit, that must be taken into consideration in estimating the loss sustained. *Burton, J. A.*, was of opinion that under the circumstances the Divisional Court were right in increasing the verdict by the amount of the insurance money. Per *Patterson, J. A.*—The receipt of the insurance money is a proper matter for the consideration of the Court or a jury in estimating the damages, and might afford ground for making some reduction from a gross assessment, but in the present case there was nothing shewn to warrant any reduction. *Hicks v. Newport, &c., R. W. Co.*, in note, 4 B. & S., at p. 403, commented on. *Beckett v. The Grand Trunk R. W. Co.*, 13 A. R. 174. Affirmed by the Supreme Court.

Held, affirming the decision of the Court of Appeal, 11 A. R. 1, which reversed the decision of the Q. B. D., 1 O. R. 545, that although on the death of a wife, caused by negligence of a railway company, the husband cannot recover damages of a sentimental character, yet the loss of household services accustomed to be performed by the wife, which would have to be replaced by hired services, is a substantial loss for which damages may be recovered, as is also the loss to the children of the care and moral training of their mother. (*Taschereau and Gwynne, JJ.*, dissenting). *The St. Lawrence and Ottawa R. W. Co. v. Lett*, 11 S. C. R. 422.

## NEW TRIAL.

### I. IN WHAT CASES.

1. *Defamation*, 472.
2. *Negligence*, 472.
3. *Seduction*, 472.

### II. FOR WHAT CAUSE.

1. *Ruling as to Right to Begin*, 472.
2. *Excessive Damages*, 472.
3. *Surprise at Trial*, 472.
4. *Discovery of New Evidence*, 472.
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6. *Improper Admission of Evidence*, 473.
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10. *Where Verdict is against Evidence, or the Weight of Evidence.*
  - (a) *Where Verdict does Substantial Justice*, 474.
  - (b) *Other Cases*, 474.
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12. *Jury.*
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#### I. IN WHAT CASES.

##### 1. *Defamation.*

See *Bradley v. McIntosh*, 5 O. R. 227, p. 473; *Wilcocks v. Howell*, 5 O. R. 360, p. 185; *Huber v. Crookall*, 10 O. R. 475, p. 189; *Massie v. Toronto Printing Co.*, 11 O. R. 362, p. 191; *Dominion Telegraph Co. v. Silveer et al.*, 10 S. C. R. 238, p. 187.

##### 2. *Negligence.*

See *Clarke v. Rama Timber and Transport Co.*, 9 O. R. 68; *The Town of Portland v. Griffiths*, 11 S. C. R. 333.

##### 3. *Seduction.*

See *Adair v. Wade*, 9 O. R. 15; *Udy v. Stewart*, 10 O. R. 591.

#### II. FOR WHAT CAUSE.

##### 1. *Ruling as to Right to Begin.*

See *Miller v. Confederation Life Assurance Co.*, 11 O. R. 120, p. 345.

##### 2. *Excessive Damages.*

For wrongful dismissal. See *Guildford v. The Anglo-French Steamship Co.*, 9 S. C. R. 303.

In action for libel. See *Massie v. Toronto Printing Co.*, 11 O. R. 362.

See *Tuckett v. Eaton*, 6 O. R. 486, p. 420.

##### 3. *Surprise at Trial.*

See *Mulligan v. Grand Trunk Railway*, 12 O. R. 103.

##### 4. *Discovery of New Evidence.*

Held, that upon the discovery of material evidence publication may be opened even after judgment affirmed by the two courts above. The learned judge here considered that what was proposed to be introduced as new evidence was not material, and dismissed the petition, with costs. *Synod v. DeBlaquiere*, 10 P. R. 11.—Proudfoot.

See *Miller v. Confederation Life Assurance Co.*, 11 O. R. 120, 14 A. R. 218, p. 345; *Bank of British North America v. Western Assurance Co.*, 11 P. R. 434, p. 475. See also *McMillan v. Grand Trunk Railway*, 12 O. R. 103.

##### 5. *To Produce Further Evidence.*

Held, that T. L. having in his pleadings set up that J. L. had been in possession for twenty-two years as his tenant, could not obtain a new trial on the ground that he could shew by evidence that she had been in as a caretaker for him. *Hickey et al. v. Stover*, 11 O. R. 106.—Chy. D.



At the trial of a case with a jury, the judge of the County Court at the conclusion of the plaintiff's evidence, and without hearing any evidence on the part of the defendants, nonsuited the plaintiff. In the following term the judge set the nonsuit aside and entered judgment for the plaintiff, claiming a right under the circumstances to do so. On appeal this court, while satisfied with the ruling of the judge on the legal liability of the defendants, set the nonsuit aside and ordered a new trial upon the facts, so as to afford the defendants an opportunity of adducing evidence; but, under the circumstances, refused them any costs of the appeal. Rules 311, 312, 319, and 321 of O. J. Act, discussed. *Baker v. The Grand Trunk R. W. Co.*, 11 A. R. 68.

#### 6. Improper Admission of Evidence.

In an action for libel and slander the plaintiff's counsel insisted on the production of a certain anonymous letter written by the defendant to the Ontario Government, relating to the licensing of the plaintiff's hotel. The head of the department attended and declined to produce the letter on the ground that its production would be injurious to the public service, and it was therefore privileged. The learned judge at the trial, on plaintiff's counsel insisting on its production, ordered it to be produced, but stated if the court should hold that the production was not compellable, any verdict recovered would go for nothing. The letter was then produced and read. The learned judge told the jury that the letter was not evidence of libel, and it was privileged, but that it could be looked at as evidence of malice on the slander count. The jury found for the plaintiff:—Held, that the question whether the production of such a document was injurious to the public service, must be determined, not by the judge, but by the head of the department having the custody of the paper, and the production of the document ought not to have been compelled. Under the circumstances the court granted a new trial without costs. *Bradley v. McIntosh*, 5 O. R. 227.—C. P. D. See 49 Vict. c. 16, s. 16.

In seduction. See *Udy v. Stewart*, 10 O. R. 391.

See *Pirie v. Wyld*, 11 O. R. 422, p. 222; *Dominion Telegraph Co. v. Silver et al.*, 10 S. C. R. 238, p. 187. See also *McDonald v. Murray et al.*, 5 O. R. 539; *Ellis v. Abell*, 10 A. R. 226.

#### 7. Improper Rejection of Evidence.

The testimony of a witness, since deceased, taken on a former trial, was rejected by the judge at the trial herein:—Held, that although improperly rejected, yet other evidence to the same effect having been received, it could not be said that the result would have been varied by the admission, and a new trial was accordingly refused. *Copeland v. The Corporation of the Township of Blenheim*, 9 O. R. 19.—C. P. D.

Of witnesses ordered out of Court. See *Macdonald v. Macdonell et al.*, 9 O. R. 137; *Black v. Besse*, 12 O. R. 522.

See *Huber v. Crookall*, 10 O. R. 475, p. 189; *Regan v. Waters*, 10 A. R. 85, p. 244.

#### 8. Contradictory Evidence.

See *Grieve v. The Molsons Bank*, 8 O. R. 162, *infra*.

#### 9. Misdirection of Judge.

See *Miller v. The Confederation Life Assurance Co.*, 11 O. R. 120, 14 A. R. 218, p. 345; *Furlong v. Reid*, 12 O. R. 607, p. 246. See also *Scoullall v. Stapleton*, 12 O. R. 206.

#### 10. Where Verdict is Against Evidence or the Weight of Evidence.

##### (a) Where Verdict Does Substantial Justice.

On application for a new trial upon the weight of evidence, where there has been no miscarriage in law, the question is, does the verdict in the opinion of the court do substantial justice; and, if not, is the evidence in their opinion sufficient to warrant interference. In this case where the verdict rested entirely upon the plaintiff's testimony as opposed to that of two witnesses not interested, the court were of opinion that the verdict did not do substantial justice, and a new trial was granted. *Grieve v. The Molsons Bank*, 8 O. R. 162.—C. P. D.

##### (b) Other Cases.

The father of the plaintiff applied to the defendant company for a loan of \$2,500 secured by land valued by the company's appraiser at \$3,500. In answer to certain questions put to the applicant, in a printed form of application for loan, he stated himself to be the owner of certain horses, cows, sheep, and other stock. The plaintiff was present with his father at the time of making the application, but swore that he was not aware of the answers given by him as to his personal effects. The defendants sued and obtained execution against the father, under which they seized some of the stock in the possession of the son, who had been residing apart from his father, and from whom, prior to the above application, he had purchased it. In an interpleader issue between the son and the company the jury found in favour of the claim of the former, which verdict the judge of the County Court refused to set aside. On appeal this court, although they considered that a verdict for the defendants would have been more satisfactory, refused to disturb the judgment, the question being one proper for the decision of the jury. *Malcolmson v. Hamilton Provident and Loan Society*, 10 A. R. 610.

The Supreme Court will not hear an appeal where the court below in the exercise of its discretion has ordered a new trial on the ground that the verdict is against the weight of evidence. *The Eureka Woollen Mills Co. (Limited) v. Moss*, 11 S. C. R. 91.

See *Mara v. Cox*, 6 O. R. 359, p. 68; *Campbell v. Cole*, 7 O. R. 127, p. 310; *Garland v. Thompson*, 9 O. R. 376, p. 275. See also *The Town of Portland v. Griffiths*, 11 S. C. R. 333.

#### 11. Inconsistent Findings of Jury.

See *McQuay v. Eastwood*, 12 O. R. 402, p. 428.

12. *Jury.*(a) *Improperly Influencing.*

The defendants objected that by reason of frequent interruptions and reading of text books by plaintiff's counsel during the delivery of the judge's charge injustice was done defendants, and the jury improperly influenced thereby:—Held, that this was a matter for the judge at the trial, and it would have to be a very strong case for the court to interfere, and the judge had made no complaint. *McDonald v. Murray et al.*, 5 O. R. 559.

(b) *Other Cases.*

At the trial it appeared that the counsel for P. had left the court before the judge's charge, having authorized F., counsel for two other defendants, to take on his behalf any objections he might think proper to the charge. The jury, after hearing the judge's charge, were allowed to separate and be at large from Saturday till Monday, before giving their verdict, which was against the defendants P. and R.:—Held, reversing the decision of the Queen's Bench Division, 7 O. R. 555, that such a proceeding could not be upheld except upon clear affirmative evidence of consent expressly and knowingly given; and, therefore, where counsel for the defendant P. had left the court before the judge's charge, and it did not appear that he had authorized any one to represent him or his client, or that any one had consented or assumed to consent on behalf of P. to the jury separating, a new trial as to P. was directed:—Per Osler, J. A.—Had F. assumed to represent the counsel for P. in assenting to a separation of the jury, P. would have been bound to the same extent as if his own counsel had taken a similar course, contrary to instructions. *Stillwell v. Rennie et al.*, 11 A. R. 724.

The defendant, in conversation with one of the jury panel, but not one of the jury called to try the case, said he hoped the jury would give the defendant the benefit of any doubt:—Held, not sufficient to justify the court in interfering with the verdict. *Vanmere v. Farewell*, 12 O. R. 285—C. P. D.

13. *To Amend Pleadings.*

A new trial was granted in this case, there being circumstances requiring further consideration, with leave to so amend the pleadings and add such parties as might be necessary. *Ward v. Hughes*, 8 O. R. 138—C. P. D.

14. *Other Cases.*

The jury having found no damages, an order nisi for a new trial was discharged, without costs. *Lemay v. Chamberlain*, 10 O. R. 638—Q. B. D.

The objection, that the judge at the trial should have himself decided the issue as to failure of consideration, instead of directing an inquiry before the master, is not one that the court will entertain. *Featherstone v. VanAllen*, 12 A. R. 133.

See also *Clarke v. The Rawa Timber Transport Company (Limited)*, 9 O. R. 68.

## III. PRACTICE.

Held, that a defendant is not entitled to remove proceedings by certiorari to a Superior Court from a police magistrate, or a justice of the peace, after conviction at any time, for the purpose of moving for a new trial for the rejection of evidence, or because the conviction is against evidence, the conviction not being before the court, and no motion made to quash it. *Regina v. Richardson*, 8 O. R. 651.—Q. B. D.

A petition by the plaintiffs for leave to produce newly discovered evidence, and to re-open the case for its admission after the judgment of the Court of Chancery in favour of the defendants had been affirmed by the Court of Appeal and the Supreme Court of Canada, was brought on for hearing before Proudfoot, J., in court:—Held, that as the application might, before the O. J. Act, have been made to a single judge, and as there is no provision in that Act specially applicable to the subject, the original practice of the court remains, and the application was properly made to a single judge. *Synod v. DeBlaquiere*, 10 P. R. 11.

An application to open the case and put in further evidence, and for a new trial upon fresh evidence, or for leave to bring a new action upon a part of the original claim founded upon such evidence, is properly made to the judge who heard the original cause:—Semble, R. S. O. c. 38, s. 46, would have the effect of preventing an appeal from a judgment more than a year old, unless leave were obtained from the Court of Appeal; but if new evidence were admitted, and the case heard anew, the time for appealing would run from the date of the later judgment:—Semble, also, R. S. O. c. 38, s. 22, was not intended to apply to newly discovered evidence. *Synod v. DeBlaquiere*, 10 P. R. 11, followed. *The Bank of British North America v. The Western Assurance Co.*, 11 P. R. 434.—Proudfoot.

In moving against the ruling of the judge at the trial with respect to the reception or rejection of evidence, or on the ground that he has misdirected the jury, it is still necessary to state the grounds in the notice of motion or rule. *Scott v. Crerar*, 11 O. R. 541.—C. P. D.

## IV. APPEAL ON APPLICATIONS FOR NEW TRIAL.

See *Malcolmson v. Hamilton Provident and Loan Society*, 10 A. R. 610; *The Eureka Woolen Mills Co. (Limited) v. Moss*, 11 S. C. R. 91, p. 474.

## NEAT FRIEND.

See HUSBAND AND WIFE—INFANT.

## NON-RESIDENT LANDS.

See ASSESSMENT AND TAXES.

## NONSUIT.

Where in a jury case the Judge at the trial enters a nonsuit, a notice of motion, and not an

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D TAXES.

Judge at the trial  
motion, and not as

order nisi, is the proper mode of moving against  
it. *Clarkson v. Snider*, 10 O. R. 561.—C. P. D.

At a trial of a case with a jury the Judge of  
the County Court at the conclusion of the plain-  
tiff's evidence and without hearing any evidence  
on the part of the defendants nonsuited the  
plaintiff. In the following term the Judge set  
the nonsuit aside and entered judgment for the  
plaintiff claiming a right under the circumstances  
to do so. On appeal this court while satisfied  
with the ruling of the Judge on the legal liability  
of the defendants set the nonsuit aside and  
ordered a new trial upon the facts so as to afford  
the defendants an opportunity of adducing evi-  
dence, but under the circumstances refused any  
costs of the appeal. Rules 311, 312, 319 and 321  
O. J. Act, discussed. *Baker v. The Grand  
Trunk R. W. Co. of Canada*, 11 A. R. 68.

See also *Ryan v. The Canada Southern R. W.  
Co.*, 10 O. R. 745.

## NOTICE.

- I. OF ACTION—See ACTION.
- II. OF APPEAL—See COURT OF APPEAL.
- III. OF CLAIMS—See BANKRUPTCY AND INSOL-  
VENCY.
- IV. OF PROTEST—See BILLS OF EXCHANGE  
AND PROMISSORY NOTES.
- V. OF CALLS ON STOCK—See CORPORATIONS.
- VI. UNDER POLICIES—See INSURANCE.
- VII. OF MOTION—See PRACTICE.
- VIII. JURY NOTICE—See TRIAL.
- IX. OF TRIAL—See TRIAL.
- X. BY REGISTRATION OF INSTRUMENTS—See  
REGISTRY LAW.

To accountant. See *Cottingham v. Cottingham*,  
11 O. R. 294.

To revising officer. See *Simmons v. Dalton*,  
12 O. R. 505.

## NUISANCES.

- I. RESTRAINING—See INJUNCTION.
- II. POWERS OF MUNICIPALITIES—See MUNI-  
CIPAL CORPORATIONS.
- III. WATER—See WATER AND WATER COURSES.

Held, barbed wire fences constructed by a rail-  
way upon an ordinary country road could not be  
treated as a nuisance. See *Hildyard v. Grand Trunk  
R. W. Co.*, 8 O. R. 583.

## OCCUPATION RENT.

See IMPROVEMENTS ON LAND.

## OFFICE.

The plaintiffs appointed the defendant chief of  
police of the town of Stratford, at a named salary,

but stipulated that he should act as county con-  
stable within the town only, and account for and  
pay over to the plaintiffs all fees received by him  
from the county as a reward for services per-  
formed by him as county constable:—Held, that  
under 5 and 6 Edw. VI. c. 16, and 49 Geo. III. c.  
126, the agreement to account for such fees was  
invalid. Quære, whether the plaintiffs, or the  
Board of Police Commissioners, had the power  
to appoint the defendant; and whether, apart  
from the statutes mentioned, it was not ultra  
vires of the plaintiffs to bargain with the defen-  
dant for the accounting to them for the fees of  
another office not under their control. *Corpora-  
tion of Town of Stratford v. Wilson*, 8 O. R. 104.—  
Rose.

An affidavit cannot be required from a public  
officer as to the proper discharge of his duty.  
*Re Morton and Loz No. 6 on Plan No. 580 in the  
County of York*, 7 O. R. 59.—Proudfoot.

See also *The Corporation of the Municipality  
of the Township of Adjula v. McElroy et al.*, 9  
O. R. 580.

## OFFICIAL GUARDIAN.

Costs of. See *Westgate v. Westgate, et al.*, 11  
P. R. 62, p. 323.

## ORDERS.

See PRACTICE—RULES AND ORDERS.

## OVERHOLDING TENANT.

See LANDLORD AND TENANT.

## OYER AND TERMINER.

See COURT OF ASSIZE.

## PARENT AND CHILD.

- I. CUSTODY OF INFANT—See INFANT.
- II. UNDUE INFLUENCE—See FRAUD AND MIS-  
REPRESENTATION.

Per Proudfoot, J. A son working at home  
upon his father's place would not be entitled to  
recover for work and labour in the absence of  
an agreement to that effect. *Campbell v. Mc-  
Kerriher*, 6 O. R. 85.

D. B. and W. D. B. were partners in a cer-  
tain Joint Stock Savings Bank, under articles  
which provided that the partnership should last  
during their joint lives, and that they should  
share the profits and expenses. D. B. died in  
April, 1874, leaving a will, whereby he be-  
queathed to W. S. B., the son of W. D. B., the  
residue of his property, including his interest in  
the bank, and appointed L. his executor. In  
May, 1874, L. gave W. D. B. a general power  
of attorney to act for him. In July, 1879, W.

S. B. came of age, and soon after demanded of W. D. B. an account of the assets of the partnership and a settlement with him; and in November, 1880, W. D. B. gave the plaintiff a cheque for \$8000, handing him at the same time a document for signature, which purported to be a receipt of the said sum in full of all claims on the estate of D. B. and W. S. B. signed it. W. S. B. now brought this action against W. D. B. and L., alleging that after the death of D. B., W. D. B., with L.'s connivance, made certain arrangements for the winding up of the partnership, and that large portions of the assets of D. B. and of the bank had been realized, and profits made, and converted by W. D. B. to his own use, and claiming to have the said release declared void, and an account of the estate of D. B., and of the partnership, and to have the same wound up, and payment of the share to which he was entitled:—Held, that as to the alleged settlement of November, 1880, W. S. B. and his father could not be said to have been on equal terms, and the document in question was not binding upon the former; that it was clearly the duty of his father, before making any settlement with him, to give him the fullest possible information regarding the estate and his dealings with it, even if then, under the circumstances, a settlement binding on the plaintiff could have been made:—Held, on the whole case, that the plaintiff was entitled to the account asked, and that as regarded the increase or profits in the dealings with the capital of the estate, these should be proportioned in accordance with the amount of such capital owned respectively by the testator and the defendant, W. D. B., and the defendant W. D. B. should be allowed a liberal remuneration for his exertions, care, time, and trouble in the management of the estate, which appeared to have been skilful and successful. *Burn v. Burn*, 8 O. R. 237. —Ferguson.

Deed by parent to child subject to condition of maintenance. See *Millette v. Sabourin*, 12 O. R. 248 p. 158.

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II. ELECTIONS—See PARLIAMENTARY ELECTIONS.

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XII. ACTIONS FOR PENALTIES, 504.

### I. REVISING OFFICER AND VOTERS' LIST.

A revising officer under the Electoral Franchise Act, 48-49 Vict. c. 40 (Dom.), having declined to entertain the application of S. to have the name of D. struck off the voters' list on the ground that the notice to D. provided for by sec. 26 of the Act was not proved, and that the notice to the revising officer provided for by same section was not duly served on or given to him in time; on an application for a mandamus to the revising officer, although it appeared no copy of the notice to D. was kept, and no notice to produce the original was served, it was shewn by two witnesses that a notice to D. filled up on a printed form with his name, address, and the

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objection to his vote had been mailed to him by a prepaid registered letter on June 26th, for the sittings of the revising officer on July 12th following, and the certificate of registration was produced, although the witnesses had no distinct individual knowledge of the particular notice to D., and that such evidence had been given before the revising officer:—Held, that in the absence of evidence to the contrary such proof was sufficient. *Re Simmons and Dalton*, 12 O. R. 505.—Proudfoot.

The notice to the revising officer was left with his clerk at his office during the absence from town of the revising officer on Monday, June 26th, and on his return on the afternoon of that day he was told what had been done, and that if he did not consider that sufficient the notice would be procured again and served on him personally, but he said what was done was sufficient:—Held, that the last day for service for the sittings for the final revision to be held July 12th was Sunday, June 27th, but that under s. 2, sub-s. 2 of the Act, the time was extended, and S. had all the next day, and that the notice was given on Monday. *Ib.*

Held, also, that the service of the notice on the clerk of the revising officer was, under secs. 19 and 26, a sufficient "depositing with" the revising officer to satisfy the statute, and the conduct of the revising officer amounted to an adoption of the action of the clerk, and was equivalent to personal service if such were required by the statute. *Ib.*

Held, also, that the revising officer erred in point of law in assuming that the notice to him required personal service, and that it was too late, and in holding that notice to produce the notice to D. should have been given which were not findings of fact, and such mistakes or errors are not such provisions as prevent the granting of the writ of mandamus. If he had found as a matter of fact that notice was not given to D., there might have been some difficulty in interfering with his conclusion. The Centre Wellington Case, 44 Q. B. 132, referred to and distinguished. *Ib.*

It was contended that the revising officer was an appointment of the Dominion Government, and that his sittings were sittings of a Court of Record, and that there was no jurisdiction in a Provincial Court to issue a mandamus to him:—Held, that the Dominion Parliament had, by the Electoral Franchise Act, interfered with civil rights in this province, and having made no provision for a court to superintend the conduct of the officials, and following *Valin v. Langlois*, 3 S. C. R. 1, that until such a court is created the Provincial Courts by virtue of their inherent jurisdiction have a right to superintend the discharge of their duties by any inferior officer or tribunal. *Ib.*

## II. QUALIFICATION AND DISQUALIFICATION OF VOTERS.

### 1. Voters in Unorganized Townships.

Held, by Patterson, J. A., and Ferguson, J., that (1) a person, the owner of real estate of the value of \$200 or upwards, anywhere within the electoral district, has the right to vote at any polling place in the unorganized townships in the

electoral district where he may happen to be on polling day; (2) That where the real estate on which such person relies as his qualification to vote is situate in one of the unorganized townships his right is to vote in any of the unorganized townships without being restricted to the township where his property may be situate; (3) That to entitle a person to vote in the unorganized townships on the qualification of householder, he must be a householder—i. e., have his qualification as such—within the limits of the unorganized township. *Muskoka and Parry Sound Election (Ont.) Paget et al. v. Fauquier*, 1 E. C. 197.

### 2 Disqualification.

By order in council the defendant was appointed agent for the location and sale of lands under the Free Grants and Homesteads Act, R. S. O. c. 24. By letter from the Crown Lands Department the defendant was instructed to enter upon his duties respecting the location of free grants, but not to sell lands or receive money until he had given the usual security. By R. S. O. c. 10, s. 4, all "agents for the sale of Crown Lands," amongst other persons, are disqualified from voting at elections for the Legislature, under a penalty. The defendant before he had given the necessary security, voted at an election for the Legislature:—Held, that he was an agent for the sale of Crown Lands within the meaning of the Act, R. S. O. c. 10, s. 4, and therefore liable to the penalty imposed. Whether or not the defendant was such an agent is a question of law and not a question for the jury. *Strigley v. Taylor*, 6 O. R. 108.—C. P. D.

### III. NOMINATION.

Under s. 33 of R. S. O. c. 10, the returning officer is to fix the place and time of nomination, such time to be between eleven a.m. and two p.m., of the day fixed therefor. The returning officer, who lived at B., owing to inevitable accident arising from the train being blocked with snow, did not reach O. the place of nomination till two p.m. and the hustings until ten minutes afterwards. The two candidates who contested the constituency were then nominated in the presence of a large number of electors, including the petitioner, who made no protest. It did not appear that any injury had been caused thereby. Per Boyd C. The requirement was merely directory or regulative: that non-compliance therewith might or not be fatal, and so avoid the election, according to circumstances; and that as no one was prejudiced, it could have no fatal effect. In any event the petitioner, under the circumstances, was estopped from raising the objection; and:—Sembly, he was also precluded from raising the objection by reason of, as it appeared, his claiming the seat for the defeated candidate, thus ratifying and adopting what was done at the election. Per Cameron, J. The requirement was imperative, and non-compliance therewith avoided the election; and the petitioner was not estopped from raising the objection. On appeal to the Court of Appeal, the judgment proceeded on another ground. Per Burton, J. A. The point was now covered by s. 48 of 47 Vic., c. 4 (Ont.). Per Patterson, J. A.—Quare, whether s. 48 was intended to apply to this point, this

being a matter specially dealt with by s. 15 of R. S. O. c. 10. *East Simcoe Election (Ont.)—Reid v. Drury et al.*, 1 E. C. 291.

#### IV. NOTICE OF DISQUALIFICATION OF CANDIDATES.

At the nomination a protest was handed to the returning officer, signed by the defeated candidate and three electors, claiming that respondent was disqualified, and that the opposing candidate was entitled to the seat. Notice thereof was posted at some of the polls, and some electors were told of it:—Held, on the evidence, the trial judges having refused to award the seat to the defeated candidate, the court in appeal would not interfere. *South Renfrew Election, (Ont.)—1 E. C. 339.*

#### V. OPENING POLL AND TAKING VOTES.

See *East Simcoe Election (Ont.)—Reid v. Drury et al.*, 1 E. C. 291, p. 499.

#### VI. MARKING BALLOTS.

##### 1 Manner of.

Certain ballot papers were objected to as having been imperfectly marked with a cross, or having more than one cross, or having an inverted V, or because the cross was not directly opposite the name of the candidate, there being only two names on the ballot paper and a line drawn dividing the paper in the middle:—Held, affirming the ruling of the learned judge at the trial, that these ballots were valid. Per Ritchie, C. J.:—Whenever the mark evidences an attempt or intention to make a cross, though the cross may be in some respects imperfect, the ballot should be counted, unless from the peculiarity of the mark made it can be reasonably inferred that there was not an honest design simply to make a cross, but that there was also an intention so to mark the paper that it could be identified, in which case the ballot should be rejected. But if the mark made indicates no design of complying with the law, but on the contrary a clear intent not to mark with a cross as the law directs, as, for instance, by making a straight line or round O, then such non-compliance with the law renders the ballot null. *Bothwell Election (Dom.)—Huckins v. Smith*, 8 S. C. R. 676.

##### 2 By Deputy Returning Officer.

In a polling division No. 3 Dawn there was no statement of votes either signed or unsigned in the ballot box, and the deputy returning officer had endorsed on each ballot paper the number of the voter on the voters' list. These votes were not included either in the count before the returning officer, the resuming up of the votes by the learned judge of the County Court, nor in the recount before the judge who tried the election petition:—Held, affirming the decision of the court below, that the ballots were properly rejected. *Bothwell Election (Dom.)—Huckins v. Smith*, 8 S. C. R. 676.

Division I, Sombra:—During the progress of the voting, at the request of one of the agents, who thought the ballot papers were not being properly marked, the deputy returning officer, who had been putting his initials and the num-

bers on the counterfoil, not on the ballot papers, initialled and numbered about twelve of the ballot papers, but finding he was wrong, at the close of the poll, he, in good faith and with an anxious desire to do his duty, and in such a way as not to allow any person to see the front of the ballot paper, and with the assent of the agents of both parties, took these ballots out of the box and obliterated the marks he had put upon them:—Held, Gwynne and Henry, J.J., dissenting, that the irregularities complained of not having infringed upon the secrecy of the ballot, and the ballots being unquestionably those given by the deputy returning officer to the voters, these ballots should be held good, and that said irregularities came within the saving provisions of sec. 80 of the Dominion Elections Act, 1874. Per Henry, J., that although the ballots should be considered bad, the present appellant having acted upon the return and taken his seat, was not in a position to claim that the election was void. *Ib.*

See *Soulanges Election, (Dom.)—Cholette v. Bain*, 10 S. C. R. 652, p. 496; *Prescott Election, (Ont.)—Cunningham v. Hagar*, 1 E. C. 88, p. 485.

##### 3 By Illiterate Voters.

The deputy-returning officer in polling the votes of some fifty illiterate voters, instead of taking from each illiterate voter a declaration "that he was unable to read," asked each if he was able to read or write, and having received an answer in the negative, requested him to put his mark to the declaration of illiteracy explaining what he conceived to be its effect thus "you hereby sign that you are unable to read or write sufficiently to mark your ballot paper." He then openly marked the ballot paper as instructed by the voter in the presence of both candidates, their agents and the poll clerk, all of whom had taken the usual declaration of secrecy. One witness also said the constable was in the room:—Held, (at the trial and on appeal) that substantially there was no violation of the principle of secret voting laid down in the Act, R. S. O. c. 10, and that the votes were not improperly taken. Per Osler, J. A. There is nothing in the Act which makes it necessary that the deputy returning officer should withdraw with the agents of the candidates and the voter to another room, or which forbids the poll clerk or other persons lawfully present in the polling booth from remaining there while the voter announces for whom he wishes to vote. Per Spragge, C. J. O. The illiterate voters were not misled, but the conduct of the deputy returning officer was perverse. The manifest policy of the Act is that the voting shall be in all cases as secret as under the circumstances it can be. It was not necessary that more than the three persons named in the Act besides the voter himself should be present: the deputy-returning officer and one representative of each candidate. The presence of any others was not in accordance with the spirit and policy of the Act and should not have been permitted by the deputy returning officer. Per Burton, J. A. Beyond the slight mistake made by the deputy-returning officer in explaining the declaration, there appears nothing in the course pursued which was not warranted by the Act, there was no



the ballot papers, twelve of the as wrong, at the ith and with an d in such a way e front of the nt of the agents s out of the box put upon them: J., dissenting, d of not having e ballot, and the ose given by the e voters, these d that said irre- ng provisions of ions Act, 1874. e ballots should ppellant having en his seat, was the election was

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one present except the deputy-returning officer, the candidates and their agents and the poll clerk, all of whom had taken the oath of secrecy except the constable, who was in another part of the room. *Prescott Election*, (Ont.)—*Cunningham v. Hagar*, 1 E. C. 88.

#### VII. DECLARATION OF SECRECY BY RETURNING OFFICER AND OTHERS.

See *East Simcoe Election* (Ont.), *Reid v. Drury et al.*, 1 E. C. 291, p. 499.

#### VIII. AGENCY.

##### 1. What Constitutes.

It appeared that when the candidate accepted the nomination of the convention of the party he intimated to those present, among whom was N., that he looked for their active exertions in carrying on the contest:—Held, per Patterson, J. A., and Ferguson, J., that this amounted to an authorization of those present, including N., to canvass and thus to act as agent, for the authorization to canvass covers agency; and even without any such express declaration the agency of those persons who were actually attending and taking part in the convention was established in the absence of anything shewing a repudiation or rejection of the offer of services, which is implied by the very fact of their attending and making the nomination. *Muskoka and Parry Sound Election*, (Ont.)—*Paget et al. v. Fawcett*, 1 E. C. 197.

The petition in this case charged that one H., as agent of the respondent in violation of R. S. O. c. 10, s. 157, sold or gave drink at his tavern within the limits of a polling subdivision on polling day, which by R. S. O. c. 11, s. 2, sub-s. 6, is made a "corrupt practice." It appeared that H. was present, and had acted as a delegate at the convention of representative reformers, whereat the respondent was nominated. The latter did not undertake a personal canvass, or appoint any particular persons or associations of persons his agents for the purpose of carrying on the contest, but at the said convention he made a speech intimating that he expected his friends to work for him:—Held, at the trial and by the Court of Appeal (Burton, J. A., dissenting), that this constituted an appointment by him of every one of those who constituted the convention as his agent for the purpose of the contest, and no proof of acts done by the persons thus addressed and recognized by the candidate, was necessary to establish the agency, and as H. undoubtedly did sell the liquor as alleged, and as this corrupt act was not shewn to be of such trifling nature and extent as to come within R. S. O. c. 10, s. 159, the election must be declared void under s. 153. Per Patterson, J. A., and Ferguson, J. (at the trial), the question of agency is one of fact, and must be decided in every case upon the circumstances immediately in question. *West Simcoe Election*, (Ont.)—*Bedford v. Phelps*, 1 E. C. 123.

No formal appointment or any particular words are necessary to constitute agency, and less positive evidence of appointment or recognition and adoption of a delegate to a party convention as an agent is required than in the case of one not a delegate. *Ib.*

Per Burton, J. A.—Even if H.'s agency generally for canvassing and assisting in the elections were established in this case, he did not stand in the relation of agent in respect of the matter complained of. The only evidence was that he sold liquor for his own purpose under a mistaken idea that he had a right to do so, and there was nothing whatever to shew that it was done in connection with his character as agent. But in fact the words spoken by the respondent at the convention to the delegates did not constitute them his agents. *Ib.*

Per Burton, J. A.—It is only for those acts of the agent which are done by him whilst acting or professing to act within the scope of his duties that the candidate is responsible. It is contrary to all principle to hold any person affected by the act of an agent, unless it was shewn that the act was done in the course of the employment, and within the scope of the authority, although it may be in abuse of it. *Ib.*

L., being a municipal councillor, and as such a member of an association which had brought out the respondent as a candidate for election, had a personal disagreement with the respondent, and refused to attend the meeting of the nominating committee when the respondent received the nomination, and when asked by the respondent to support him refused so to do, saying that he now had an opportunity of getting even with him; but without the knowledge of the respondent he took an interest in the election and bribed a voter:—Held, that he was not an agent of the respondent, and that there was evidence tending to shew that he was acting treacherously towards him. *Lennox Election*, (Ont.)—*Miles v. Roe*, 1 E. C. 41.

S., who was a political friend and supporter of the respondent, treated a meeting of electors with the knowledge, though not with the direct assent, of the respondent. It was proved at the trial that S. was a noisy, talkative man, employed as a travelling agent through the country; he had a bet or bets on the election; the respondent saw him at the meeting, and had some conversation with him in the crowd. Some time during the contest, and later than the date of the meeting, he went to respondent's office to make some suggestions, and asked his opinion as to the result, as he said some men wanted to bet with him. While there he saw some "campaign literature" on the table, and took some of it away with him, with the assent of the respondent. No evidence was given that he canvassed voters, and the respondent swore that he never gave him express authority to canvass or do any thing for him, and that he was not a man he would employ as an agent:—Held, at the trial and on appeal, that at the time of the meeting S. was nothing more than a volunteer, for whose acts the candidate was not responsible. *Prescott Election*, (Ont.)—*Cunningham v. Hagar*, 1 E. C. 88.—Patterson—Ferguson.

One A. had hired teams and taken voters to the polls contrary to R. S. O. c. 10, sec. 154, and it was proved that the candidate being in the village of G., was told that A. was there for the above purposes, and that he went to see A. in his hotel and discussed the election and the probable results, with lists of voters, &c.:—Held, per Ferguson, J., that this was sufficient to prove the agency of A. in the matter:—Held, per

Patterson, J. A., that this, and other circumstances of the case, established such agency. *Muskoka and Parry Sound Election, (Ont.)—Paget v. Fauquier, 1 E. C. 197.*

The charge was that F., a licensed hotel keeper, about four o'clock on the polling day served H. and a voter with drinks in his bar-room. F. was a member of the reform association, and generally took part in elections. He attended the meeting called for the nomination of the respondent, but he took no active part in it. On the election day he drove electors to the poll, but it did not appear on which side he was voting. The president of the reform association said he did not think that F. spoken for the respondent, and understood he was a friend of the defeated candidate; and H. said he thought he was working for the respondent. Per Boyd, C.—The evidence failed to shew that F. was an agent of the respondent. Per Cameron, J., that it was sufficient to establish such agency. On appeal, Osler, J. A., concurred with Boyd, C. The other Judges did not consider the point. *East Simcoe Election, (Ont.)—Reid v. Drury et al., 1 E. C. 291.*

See *North Ontario Election, (Ont.)—Treleven v. Gould, 1 E. C. 1, p. 494; West Northumberland Election, (Dom.)—Henderson et al. v. Guillet, 10 S. C. R. 635, p. 491.*

## 2. Powers of Agent.

Agency in election cases differs from agency in ordinary commercial or other transactions of business, inasmuch as in the case of an election the agent, constituted by whatever acts are sufficient for the purpose, may bind his principal by acts which are not only outside the scope of any authority expressly given to him, but which may be directly contrary to the express directions of the person whose agent he is held to be. *Muskoka and Parry Sound Election, (Ont.)—Paget v. Fauquier, 1 E. C. 197.*

Held, that an agent who is not a general agent, but an agent with powers expressly limited, cannot bind the candidate by anything done beyond the scope of his authority. *Berthier Election, (Dom.)—Genereux et al. v. Cuthbert, 9 S. C. R. 102.*

See *North Ontario Election, (Ont.)—Treleven v. Gould, 1 E. C. 1, p. 490.*

## IX. BRIBERY AND CORRUPT PRACTICES.

### 1. Generally.

Per Spragge, C. J. O.—When we find these two things concur, an act that comes within the designation "corrupt practice," and that the doer of the act is an agent for the candidate, we are not at liberty to say that the act was done in order to promote the objects of the agent, and not in order to promote the interest of the candidate, that, though true it is the act of the agent, it is not the act of the agent, *qua agent*. It being an act which is profitable to the doer of the act, and the making of the profit being assumed to be the motive of the doer of the act, cannot dissociate the act from the election. The *Lincoln Case, H. E. C. 391*, commented on; The

*Harwich Case, 3 O.M. & H. 69*, distinguished. *West Simcoe Election (Ont.)—Bedford v. Phelps, 1 E. C. 126.*

Semble, where a corrupt act is committed during an election contest by an agent with the knowledge of the candidate, and it turns out that the person committing it was in fact or in contemplation of the election law the agent of the candidate, it is not necessary that the candidate should, at the time have knowledge that the person committing the act is his agent, or even that he should know such person individually. The *Londonderry Case, 1 O.M. & H. 278*, and The *Dungannon Case, 3 O.M. & H. 101*, referred to and followed. *Prescott Election (Ont.)—Cunningham v. Hagar, 1 E. C. 88.*

Held, affirming the judgment of the court below, when an agent of a candidate receives and spends for election purposes large sums of money, and does not render an account of such expenditure, it will create a presumption that corrupt practices have been resorted to. *Lewis Election (Dom.)—Belleau v. Dessault, 11 S. C. R. 133.*

The suggestion of names and recommendation of Deputy Returning Officers by political associations commented on and disapproved of. *North Ontario Election (Ont.)—Treleven v. Gould, 1 E. C. 1.—Burton—Osler.*

The appointment of a voter as an agent so as to allow him to vote in a division other than his own, and near where he was employed, is not a corrupt practice. *Id.*

### 2. Bribery.

#### (a) By Candidates.

Among other charges of bribery and treating which were decided on this appeal, was the following:—One Mireau, a blacksmith, who was a neighbour of the respondent, had in his possession for two years, several pieces of broken saws which the respondent had left with him for the purpose of making scrapers out of them on shares. A few days prior to nomination the respondent went into Mireau's shop with a scraper he wanted to be sharpened, and in return for sharpening the scraper told him to keep the old pieces of saw which he might still have. Mireau in his evidence answered as follows:—"Q. He did not speak of your vote? A. No. Q. What has he said? A. He said that Mr. Magnan was coming like mustard after dinner. Q. M. Dugas did not ask you for whom you were? A. No. Q. Do you swear on the oath you have taken that M. Dugas left with you these two pieces of saw in question with the intent to buy (bribe) you? A. I think so, I cannot say that it is sure. I don't know his mind (son idée). It is all I can swear. Q. It has not changed your opinion? A. No. Q. For whom were you in the last election? A. For M. Magnan." The scrapers were worth in all about two dollars, and were of no use to the respondent, and no other conversation took place afterwards between the parties. The judge who tried the case found that there was no intention on the part of the respondent to corrupt Mireau. *Montcalm Election—Magnan et al. v. Dugas, 9 S. C. R. 93.*

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Before setting out on a canvassing tour, the appellant, the sitting member, placed in the hands of one B., who was not his financial agent, \$100 to be used for the purpose of the election. While visiting a part of the county with which the appellant was not much acquainted, but with which B. was well acquainted, they paid an electioneering visit to one K., a leading man in that locality, who indicated to B. his dissatisfaction with the candidate of his party, and stated that, although he would vote for the liberal party, he would not exert himself as much as in the former elections. The appellant then went outside, and B. asked his host: "Do you want any money for your church?" And having received a negative reply, added, "Do you want any money for anything?" K. then answered: "If you have any money to spare there is plenty of things we want it for. We are building a town hall, and we are scarce of money." B. then said: "Will \$25 do?" K. answered: "Whatever you like, it is nothing to me." The money was left on the table. Then, when bidding the appellant B. good-bye, K. said: "Gentlemen, remember that this money has no influence as far as I am concerned, with regard to the election." The appellant did not at the time, nor at any subsequent time, repudiate the act of B. This amount of \$25 was not included in any account rendered by the appellant or his financial agent, and large sums were admittedly corruptly expended in the election by the agent of the appellant:—Held, affirming the judgment of the court below, that the giving of the \$25 by B. to K. was not an act of liberality or charity, but a gift out of appellant's money, with a view to influence a voter favorable to the appellant's candidature, and that although the money was not given in the appellant's presence, yet it was given with his knowledge, and therefore that the appellant had been personally guilty of a corrupt practice. *Megantic Election (Dom.)*—*Cote v. Goulet*, 9 S. C. R. 279.

#### (b) By Agents.

Where N. who appeared to have been agent of a candidate called upon M., an elector, and, without directly asking him to vote, handed him one of the candidate's cards, and stated that he was going to give M.'s wife a present, but that he could not give M. a present, because it was election time, and that M. could get a present for his wife any day he was in B. (one of the places where voting was to take place); and M. went to B. the night of the election and got the present, which was tea and sugar, &c., worth about \$2:—Held, (at the trial) per Patterson, J. A., and Ferguson, J., that this came within the acts spoken of in R. S. O. c. 10 s. 149, (a) and that the goods having been given to M. under the idea that he had voted, it was immaterial whether it was proved that M. had actually voted or not. *Muskoka and Parry Sound Election (Ont.)*—*Payet et al. v. Fauquier*, 1 E. C. 197.

P., an agent of the respondent, on the morning of the election, called on the wife of one K., and asked her to use her influence with her husband to induce him to vote for the respondent, saying: "I will make it all right." She told her husband, who laughed, and replied that he intended to vote for the respondent any way, or

that he would do as he liked, and he did vote. After the election the wife called at P.'s store, and having reminded him of his promise, she went into the grocery department and got goods to the value of \$4.49. Subsequently an account was rendered including this \$4.49, and the husband objected to pay it. She then told a clerk of P.'s that that part of the account was "settled off election time," and a new account was subsequently rendered by the attorney of the estate, as P. had failed in the meantime, with that item omitted. Per Burton, J. A.—The words of the promise in themselves alone did not amount to "an offer or promise of money or other valuable consideration," but being followed after the election by the present of goods, the gift was made in pursuance of the promise, and therefore corruptly; but that as P.'s agency had terminated with the election, it was not such a corrupt practice as to affect the candidate unless done with his privity and assent. Per Osler, J. A.—P. intended to convey and did convey to the wife the idea that if she procured or would induce her husband to vote as he wished, she would receive something of value; the giving of the groceries after the election was an act of bribery, and if it stood alone it would have been necessary to carry the evidence of agency further, but following the promise it showed what both parties understood, and to that extent the respondent was affected by what was done after the election:—Held, also, under all the circumstances, that this being the single corrupt act proved the case was a proper one for the application of sec. 159, though the majority was only twenty, and the election should not be avoided. *North Ontario Election (Ont.)*—*Treleaven v. Gould*, 1 E. C. 1.

S., an agent of the respondent, with his own conveyance brought a voter from N. to his own house, where he remained as a guest until after the polling day:—Held, not within either secs. 153 or 154 of the Act. *Id.*

D., an agent of respondent, bribed M., a voter, by payment of money. The same D. gave one L., after he had voted, \$1, which both D. and L. said was a loan and not a gift:—Held, as to the first payment, per Boyd, C., and Cameron, C. J., a corrupt practice; as to the latter payment, per Boyd, C., not a corrupt practice, the evidence not connecting the payment with the vote given. Per Cameron, J., that it did. *East Middlesex Election (Ont.)*—*Rhodes v. McKenzie*, 1 E. C. 250.

H., a voter, was paid \$4 by an agent of respondent for one day's work posting bills:—Held, per Boyd, C., not a corrupt practice; per Cameron, C. J., an unreasonable large payment for the work done though not sufficient, if it were the only charge, to avoid the election. *Id.*

The following acts were relied on as sufficient to have the election set aside. H., a Conservative, prior to the election, canvassed in company with the respondent, one B. On election day H. was selected by the assistant secretary of the association (an acknowledged agent of the respondent) to represent the respondent at the Burnley poll, and obtained from him a certificate under s. 42 of the Dominion Elections Act, entitling him to vote at the Burnley poll. H. there met B. and treated him by giving him a glass of whiskey, and after B. had voted he gave him \$2 and subsequently sent him

**§50.** The treating according to B.'s evidence was nothing more than an act of good fellowship; and according to H.'s account, that B. was not feeling well, and the whiskey was given in consequence. B. negatived that the \$2 were paid him for his vote, and H. said that he supposed it was a dollar bill and told B. to go and treat the boys with it, and that it was not given on account of any previous promise or for his having voted. The court (*Hardman v. Guillet*, 1 E. C. 32,) a quo held that none of these acts constituted corrupt acts so as to avoid the election. On appeal to the Supreme Court of Canada:—Held, per Ritchie, C. J., and Henry and Taschereau, JJ.—There was sufficient evidence of H.'s agency, but it was not necessary to decide this point. Per Strong, J.—There was no proof of H.'s agency. Agency is not to be presumed from the fact that the respondent permitted H. to canvass B. in his presence, and there is an entire absence of proof of any sufficient authority to H. to bind the respondent by his acts at the polling place in the matters of treating and the payment of the \$2. Per Fournier, J., that the treating of B. on polling day, both before and after he had voted, by H., an agent, and the giving of the sum of \$2 immediately after he had voted, were corrupt acts sufficient to avoid the election. *West Northumberland Election (Dom.)*.—*Henderson et al. v. Guillet*, 10 S. C. R. 635.

The payment by an agent of a sum of \$147 to a voter claiming the same to be due for expenses at a previous election, and who refuses to vote until the amount is paid, is a corrupt practice. *Lewis Election (Dom.)*.—*Bellevue v. Dessault*, 11 S. C. R. 133.

A payment of \$10 was made to P. H. to go some miles for voters, although another messenger was sent and paid by another agent for the same purpose, who failed to get through on account of the roads, and returned the money:—Held, that there was no reason to suppose that the money was paid colourably. *North Ontario Election (Ont.)*.—*Treleaven v. Gould*, 1 E. C. 1.—*Burton*—Osler.

H. was a prominent supporter and agent of the respondent, secretary of the reform association of the riding, delegate to the convention which nominated respondent, and an active organizer and manager of the election contest. R., a voter, well known to H., as what he called a "loose fish," and belonging to a family reputed to sell their votes, came to H., and asked for money for his vote; not succeeding, he returned next day and made a similar request. Finally he asked for \$5, because, he said, he was sick and hard up, and wanted to pay his taxes. Whereupon H. gave him \$5, but on R. pledging his word that it had nothing to do with his vote. R. told T., another voter, that if he wanted \$4 or \$5 now was his time, and introduced him to H. T. asked if any money was going, and offered his own vote for \$10, and his father and three brothers for \$20. H. gave him \$4, calling it a loan, and on T.'s word of honour that it would not influence him in the election. H. also hired the team of a man named C. for the election day. The election was very close, over 2,700 votes being polled, and respondent's majority about twenty-three:—Held, that these were clearly corrupt acts. *East Simcoe Election (Ont.)*.—*Reid v. Drury et al.*, 1 E. C. 291.

See *Megantic Election (Dom.)*.—*Cole v. Goulet*, 9 S. C. R. 279, p. 489.

### 3. Treating.

#### (a) By Candidates.

A respondent during his canvass and on the same evening that a public meeting was held for the purpose of promoting the election treated a number of persons, many of whom were voters collected in a bar-room. It was shewn that it was not the respondents general habit to treat, and all persons were invited to drink, and that he had not treated more than twice or perhaps three times during the canvass:—Held, not a corrupt practice, and that in view of the ordinary custom of treating in the country it might be regarded more as an expression of good feeling to those who were supporting him. *North Ontario Election (Ont.)*.—*Treleaven v. Gould*, 1 E. C. 1.—*Burton*—Osler.

See *North Ontario Election (Ont.)*.—*Treleaven v. Gould*, 1 E. C. 1, *infra*; *Muskoka and Parry Sound Election (Ont.)*.—*Page v. Fauquier*, 1 E. C. 197, p. 493; *East Middlesex Election (Ont.)*.—*Rhodes v. McKenzie*, 1 E. C. 250, pp. 493, 499.

#### (b) By Agents.

See *West Northumberland Election (Dom.)*.—*Henderson v. Guillet*, 10 S. C. R. 635, p. 491.

See also Subhead IX. 3 (d), p. 493.

#### (c) At Meetings.

An association formed "for the greater diffusion of liberal principles and the social and intellectual improvement of its members," being prevented by an accident from meeting at the town hall, held a meeting in a tavern, and was treated by the respondent:—Held, not a meeting of electors within s. 151 of the Act. *North Ontario Election (Ont.)*.—*Treleaven v. Gould*, 1 E. C. 1.—*Burton*—Osler.

Per *Burton*, J. A., under the present enactment in R. S. O. c. 10, s. 151, it need not be shewn that the meeting in question was assembled for promoting the election of the candidate furnishing the entertainment, but the meeting referred to is a meeting assembled for the purpose of promoting the election of a representative of the electoral district. Per *Galt*, J.—Refreshment was not furnished to the meeting while it was assembled, and therefore there was no offence under R. S. O. c. 10, s. 151. The meeting was to all intents and purposes at an end, and moreover, even conceding the corrupt act, it was done in ignorance, which was involuntary and excusable. *Muskoka and Parry Sound Election (Ont.)*.—*Page v. Fauquier*, 1 E. C. 197.

It appeared that on February 15th, the respondent was chosen by a convention of his party as their candidate. On February 23rd, a public meeting was held by him in a room in a hotel, which meeting was composed of about sixteen persons, some belonging to the opposite political party. A chairman was appointed and

(Dom.)—*Cote v. Gault*,

meeting.

candidates.

his canvas and on the public meeting was held for the election treated a party of whom were voters. It was shewn that it is general habit to treat invited to drink, and that more than twice or perhaps the canvas:—Held, not a meeting in view of the ordinary country it might be expression of good feeling supporting him. *North Ontario Election v. Gould*, 1 E.

lection, (Ont.)—*Treleaven v. Gould*, 1 E. C. 250, pp. 493, 499.

Agents.

land Election (Dom.)—*S. C. R. 635*, p. 491.

3 (d), p. 493.

Meetings.

and "for the greater difficulties and the social and of its members," being from meeting at the in a tavern, and was sent:—Held, not a meeting of the Act. *North Ontario Election v. Gould*, 1 E.

under the present enactment, s. 151, it need not be in question was assembling of the candidate movement, but the meeting assembled for the purpose of a representative. Per Galt, J.—Reshewed to the meeting while therefore there was no meeting of the Act. s. 10, s. 151. The meeting had purposes at an end, exceeding the corrupt act, which was involuntary and *Parry Sound Election v. Gault*, 1 E. C. 197.

February 15th, the reply a convention of his. On February 23rd, held by him in a room in was composed of about belonging to the opposite man was appointed and

the respondent addressed the meeting, as did others also. As soon as the proceedings closed i. e., when the speaking was over, nearly all present crossed the hall, and went into the bar-room. The respondent followed, first inviting the few who remained to join them, and then in the bar-room invited them to drink, which they did, he paying for the liquor. On February 27th the nomination took place, and the polling on March 13th:—Held, at the trial and by the court of appeal, Galt, J., dissenting, that this was a violation of R. S. O. c. 10, s. 151. Per Hagarty, C. J. O., and Burton, J. A., R. S. O. c. 10, s. 151, refers clearly to a meeting of electors, whether the formalities of appointing a chairman or secretary are observed or not:—Held, also, Galt, J., dissenting, that though the act of treating appeared to have been committed in ignorance that it was a violation of the statute, and it did not appear to have been committed in an ignorance which was involuntary or excusable. *Ib.*

On different occasions a few members of one of respondent's local committees met together at different taverns, to go over voters' lists and arrange as to doubtful votes, and on each occasion liquor was furnished to the committee men thus engaged, at the expense of different agents of respondent:—Held, per Boyd, C., that such committee meetings were not "meetings of electors" within the meaning of s. 151 of the Act; per Cameron, C. J., that s. 151 was specially directed against the treating of such committee meetings. On appeal:—Held by the court, Patterson, J. A., dissenting, that such meetings were within the meaning of the section:—Held, at the trial, per Boyd, C., and Cameron, C. J., that particulars and evidence shewing the furnishing of liquor to such meetings of committees, were admissible under the general allegation of the petition, that respondent by himself and his agents had been guilty of "treating." *East Middlesex Election (Ont.)—Rhoder v. McKenzie*, 1 E. C. 250.

A meeting of some thirty-five or forty electors had assembled for the purpose of promoting the election. During a meeting an agent of the respondent went into an adjoining room with four or five friends and treated and was treated by them:—Held, by the Court of Appeal, not to be a furnishing of entertainment "to a meeting of electors assembled," &c., under section 151, R. S. O. c. 10. Per Osler, J. A. The question must always be, whether the entertainment has been furnished to the general body of the electors composing such meeting, whether before, during, or after the business of the meeting, and while as a body such electors remain together at the place of meeting or elsewhere. *Prescott Election (Ont.)—Cunningham v. Hagar*, 1 E. C. 88.

See *Prescott Election (Ont.)—Cunningham v. Hagar*, 1 E. C. 88, p. 486.

#### (d) On Day of Polling.

Section 157 of R. S. O. c. 10, forbids the selling or giving of liquor at any time during the polling day, under a penalty of fine or imprisonment, and the same Act provides that any violation of that section during the hours appointed for polling, is a corrupt practice:—Held, at the trial, that a violation of the section during the polling hours by an agent of the candidate, must

be conclusively presumed to have been intended corruptly to influence the election. *Prescott Election (Ont.)—Cunningham v. Hagar*, 1 E. C. 88.

On the morning of the polling day, S. met McN. in an hotel, and asked him to vote for the respondent, to which he agreed; he then took him to his (S.'s) house, and afterwards to a tavern where he treated him, and then to a poll where he voted. S. was a man who always took an active part in every election on the Reform side, and during this election he had, on one occasion, attended a meeting of the local political organization, or committee for whose acts in the management of the election the respondent would be answerable, when some election work was done, but it was not shewn that he had canvassed except in this particular case, or that he was a member of the committee, and he swore that he was not asked to do any work. On the polling day he was actively engaged in driving voters to the polls in his own conveyance, which he said he did as a mere volunteer:—Held, that the treating was a corrupt act, but that S.'s agency was not proved. *North Ontario Election (Ont.)—Treleaven v. Gould*, 1 E. C. 1. —Burton —Osler.

S. being an agent of the respondent, on the election day brought some whiskey to a blacksmith shop near a poll, being a place where the neighbours were in the habit of congregating to warm themselves, &c., there being no tavern or public house in the neighbourhood, and treated those present (most of them being voters) without reference to their voting, and without distinction as to which side they supported:—Held, not a corrupt practice. *Lemnox Election (Ont.)—Miles v. Roe*, 1 E. C. 41.

It appeared in the evidence that at the place of polling the respondent's firm had a house in connection with their mills, where their workmen were boarded, and where the respondent himself had rooms. A short time before the election, Mrs. B., who had formerly been house-keeper of the said house, had become tenant of it, or was allowed to occupy it, and have the use of the furniture, and was paid a certain sum per week or month for each man boarding there, and a sum per day for casual boarders, and she was in this position at the time of the election. On polling day, H., a nephew and partner of the respondent, who spent the day at the polling place, told voters that if they went to the said boarding house they could warm themselves and would find dinner if they wished it, and meat and drink was accordingly caused to be given to the voters at the boarding house by H., who was clearly the respondent's agent throughout:—Held, at the trial, that the voters having come to the place for the purpose of voting, and that being their errand there, and the election being the occasion on which the provision was made and the hospitality extended to them, the act in question was done on account of each man so entertained "having voted or being about to vote," and inasmuch as it was impossible to say that the result may not have been affected by the above offer of hospitality, R. S. O. c. 10, s. 159, the election would have been void by reason thereof under s. 158, had the matter been properly charged in the petition:—Held, however, that the evidence did not show that the corrupt act was committed with the actual knowledge

and consent of the respondent, and therefore he had not incurred the penal consequences of R. S. O. c. 10, s. 161. *West Simcoe Election (Ont.)—Bedford v. Phelps*, 1 E. C. 128.

See *West Northumberland Election (Dom.)—Henderson et al. v. Guillet*, 10 S. C. R. 635, p. 491; *East Simcoe Election (Ont.)—Reid v. Drury et al.*, 1 E. C. 291, p. 487.

#### 4. Betting.

One Pringle, an acknowledged agent of the respondent and the president of the conservative association, whose candidate the respondent was, made a bet of \$5 with one Parker, a liberal, that he would vote against the conservative party, and deposited with the stakeholder the \$5, which, after the election, was paid over to Parker. At the trial Pringle denied that he was actuated by any intention to influence the conduct of the voter, and alleged that the bet was made as a sporting bet on the spur of the moment, and with the expectation that, as he said, Parker would warm up and vote; but he also admitted in evidence that it passed through his mind that some one on the voter's side would make the money good if he voted. Parker said he had formed the resolution not to vote before he made his bet, but the evidence shewed that he did not think lightly of the sum which he was to receive for his not voting, his answer to one question put to him being: "Oh! I don't know that \$5 would be an insult to any one not to vote."—Held, reversing the judgment of the court below, (1 E. C. 32,) that the bet in question was colourable bribery within the enactments of sub-s. 1, of s. 92, of the Dominion Elections Act, 1874, and a corrupt practice which avoided the election. *West Northumberland Election, (Dom.)—Henderson et al. v. Guillet*, 10 S. C. R. 635.

#### 5. Intimidation.

In an election petition it was charged that the respondent personally, as well as acting by C. A. C., P. D. and others, his agents, did undertake and conspire to impede, prevent, and otherwise interfere with the free exercise of certain voters, and that, in furtherance of a premeditated scheme, which the respondent and his agents well knew to be illegal, they did, in fact so impede, prevent, and interfere with the exercise of the franchise of certain voters, by getting their ballots marked, rendered identifiable, and consequently void, whereby the franchise of these voters was unjustifiably interfered with. At a previous election the respondent had been defeated by a majority of three votes, and the election, having been contested, was set aside, and certain voters were reported by the judge as having been guilty of corrupt practices, under sec. 104 of the Dominion Election Act. At a public meeting before the election, C. A. C., the respondent's agent, to intimidate these persons and prevent them from voting, in a speech made by him, threatened them with punishment if they voted; and subsequently printed notices to the same effect were sent to these voters. On the polling day D. P., who had been appointed deputy returning officer, on the distinct understanding with, and promise made to, the returning officer that he would not mark the ballots of

these voters, consulted with C. A. C., and on his advice and in collusion with him, marked the ballots of certain of these voters:—Held, that the election was void by reason of the attempted intimidation practised by C. A. C., and by reason also of the conspiracy between the said agent and the deputy returning officer to interfere with the free exercise of the franchise of voters, violations of sec. 95 of the Dominion Elections Act, 1874, and corrupt practices under sec. 98 of the said Act. *Soulanges Election (Dom.)—Cholette v. Bain*, 10 S. C. R. 652.

C. occupied as a boarding-house, a house of a lumber company rent free, and was paid for boarding the men by the men themselves, but through the company retaining the amount thereof out of their wages. C. acted as scrutineer for the defeated candidate, and while so acting, but after he had voted, was sent for by P., the company's manager, an agent of the respondent, and given to understand that his so acting was not satisfactory to the company and against their interests. No threat of any kind was made. C. returned to the polling place and continued to act, but on reflection, about 12 o'clock, he ceased to do so. C. had canvassed the men at the board-house for the defeated candidate, for whom some had promised to vote, and a good many of the men had voted before he left. It did not appear that what P. had said to C. was communicated to any voter, or that any voter was influenced thereby:—Held, that a charge of intimidation was not proved. *East Simcoe Election (Ont.)—Reid v. Drury et al.*, 1 E. C. 291.

After the election C. received notice of dismissal from the company, and was informed by P. that it was for talking too much in the election about one of the hands having been sent away to prevent his voting. It was charged that C. was dismissed on account of his having voted at the election:—Held, that the charge was not proved. *Ib.*

#### 6. Paying Canvassers.

Certain parties were paid as canvassers in behalf of the respondent:—Held, not a corrupt practice. *Lennox Election (Ont.)—Miles v. Roe*, 1 E. C. 41.

#### 7. Hiring Conveyances.

Held, by Patterson, J. A., and Ferguson, J., that what is referred to in R. S. O. c. 10, s. 154, is hiring vehicles to convey persons with the intention of their voting, and the qualification of such persons, or their right to vote, is immaterial, whereas s. 153 requires persons therein referred to be voters. *Muskoka and Parry Sound Election (Ont.)—Paget v. Fauquier*, 1 E. C. 197.

The hiring and paying of carters by an agent to convey voters who are known to be supporters of the agent's candidate is a corrupt practice. *Selkirk Election (Dom.)—Young v. Smith*, 4 S. C. R. 494, followed. *Levis Election (Dom.)—Bellevue v. Dessault*, 11 S. C. R. 133.

#### 8. Giving Railway Passes.

In appeal, four charges of bribery were relied upon, three of which were dismissed in the Court

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A. C., and on his him, marked the ters:—Held, that of the attempted C., and by reason the said agent and interfere with the voters, violations ions Act, 1874, and s. 8 of the said Act. *Platte v. Bain*, 10 S.

use, a house of a was paid for board- selves, but through unt thereof out of utineer for the de- p acting, but after P., the company's ndent, and given ng was not satis- at their interests. ade, C. returned ued to act, but on e ceased to do so, e board-house for om some had prom- y of the men had e appear that what ated to any voter, thereby:—Held, was not proved. *id v. Drury et al.*,

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ters by an agent n to be supporters corrupt practice. ng v. Smith, 4 S. tion (Dom.)—*Hil-* 33.

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below, because there was not sufficient evidence that the electors had been bribed by an agent of the candidate; and the fourth charge was known as the Lamarche case. The facts were as follows: One L., the agent of C., the respondent, gave to certain electors employed on certain steamboats, tickets over the North Shore Railroad, to enable them to go without paying any fare from Montreal to Berthier, to vote at the Berthier election, the voters having accepted the tickets without any promise being exacted from or given by them. The tickets showed on their face that they had been paid for, but there was evidence L. had received them gratuitously from one of the officers of the company. The learned judge who tried the case found as a fact that the tickets had not been paid for, and were given unconditionally, and, therefore held it was not a corrupt act:—Held, 1. (Fournier and Henry, J.J., dissenting.) That the taking unconditionally and gratuitously of a voter to the poll by a railway company or an individual, whatever his occupation may be, or giving a voter a free pass over a railway, or by boat, or other conveyance, if unaccompanied by any conditions or stipulations that shall affect the voter's action in reference to the vote to be given, is not prohibited by 39 Vict. c. 9 (Dom.) 2. That if a ticket, although given unconditionally to a voter by an agent of the candidate has been paid for, then such a practice would be unlawful under s. 96, and by virtue of s. 98 a corrupt practice, and would avoid the election. *Berthier Election (Dom.)*—*Genereux et al. v. Cuthbert*, 9 S. C. R. 102.

The obtaining by an agent of a candidate from the president of a railway company six passes, for which nothing had been or was ever intended to be paid, three of which were used in bringing as many voters to the poll is not a corrupt practice within the meaning of the Election Act, s. 154. The mischievous effects that might arise from such a practice on the part of railways remarked upon. *South Victoria Election (Ont.)*—*Rodden v. McIntyre*, 1 E. C. 182.

#### 9. Disqualification by Reason of Corrupt Practices.

It appearing that a number of persons visited the district, and that the object of their visit was to influence the electors by corrupt means, and that there was an organized and systematized plan to employ corrupt means to influence and carry the election in various ways, and that the trial judges were not satisfied that the respondent was ignorant that such practices were likely to be committed by persons acting in his behalf in the conduct of the election, and found that corrupt practices prevailed at the election, and declined to relieve the respondent under s. 162, of the penalties incurred by him under s. 161, the Court of Appeal now declined to interfere (Galt, J., dissenting.) Per Hagarty, C. J. O., when a corrupt practice is proved the onus is at once shifted to the respondent to bring himself within the saving clause R. S. O. c. 10, s. 162. The Prescott Election, 1 E. C. 88, followed. *Muskoka and Parry Sound Election (Ont.)*—*Paget et al. v. Fauquier*, 1 E. C. 197.

A provincial election trial was held in 1883, before Cameron, J., and Boyd, C., who made separate reports agreeing in avoiding the elec-

tion under R. S. O., c. 10, s. 161, by reason of respondent paying or consenting to the payment of the travelling expenses of certain voters to convey them to the poll; but differing in their judgments as to whether the respondent was guilty thereby of a corrupt practice under said s. 161. Cameron, J., reported that respondent was proved guilty of said corrupt practice; and Boyd, C., reported that the said respondent committed an illegal act under s. 154 in sanctioning such payment, but without any corrupt intent, and in ignorance, which was involuntary and excusable, under a belief that as long as he did not personally bear or pay the said expenses it was not illegal, and under the fullest belief that the said voters were bound or were willing to repay the said expenses or allow them to be deducted from their wages. A subsequent election took place on 18th January, 1884, when respondent was elected. A petition was filed attacking his election on the ground of the prior disqualification of the respondent:—Held (Patterson, J., dissenting), affirming the judgment of the trial judges, Burton, J. A., and Galt, J., that the finding that the respondent was guilty of a corrupt practice was correct; and that he was therefore personally disqualified; and as there was not a concurrent finding that he came within the relieving clause of s. 162 the disqualification was not removed; and that the amending Act 47 Vict. c. 4, s. 48 (Ont.), which was passed on 25th March, 1884, did not apply to this case. *South Renfrew Election (Ont.)*—*Harvey v. Dowling*, 1 E. C. 259. See 48 Vict. c. 2 s. 18.

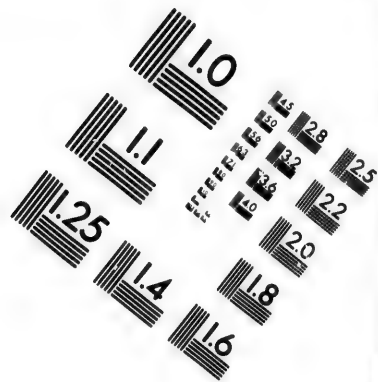
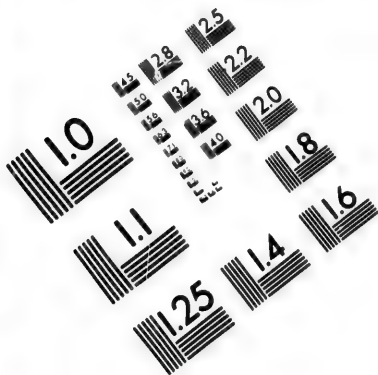
See *East Middlesex Election (Ont.)*—*Rhoder v. McKenzie*, 1 E. C. 250, p. 499.

#### X. ACTS OF TRIFLING NATURE NOT AFFECTING RESULT OF ELECTION.

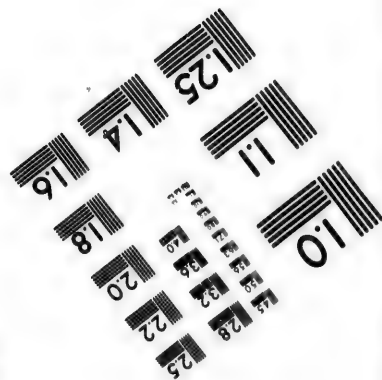
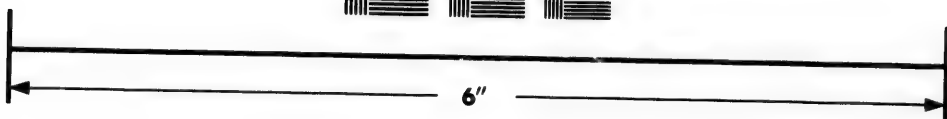
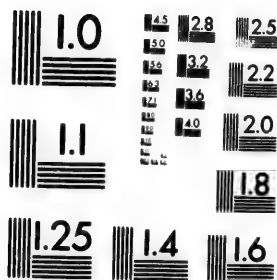
Per Spragge, C. J. O.—The power of saving an election under R. S. O. c. 10, s. 159, should be exercised very cautiously, and a fortiori by the judges of the Appellate Court where the rota judges have deemed the case to be not proper for the application of the power given by this section of the Act. *West Simcoe Election (Ont.)*—*Bedford v. Phelps*, 1 E. C. 126.

Per Patterson, J. A., and Ferguson, J., the object and purpose of R. S. O. c. 10, s. 159, do not require anything in the shape of an attempt to estimate the number of votes which can be shewn or surmised to have been affected by the corrupt act in question, and to balance that against the actual majority. Although, no doubt, the word "trifling" must be construed in each case with some reference to the majority, particularly when considering the extent of the corrupt acts, the court is not called upon to enter into a quasi scrutiny for the purposes of this section. *Id.*

Although the irregularities of the deputy returning officer could not, by themselves, be said to have affected the election:—Quere, whether in conjunction with another corrupt act which was found to have been committed by an agent of the candidate, they could under section 159, conjointly be said to have done so:—Held, at the trial, that the irregularities were not "illegal practices" as mentioned in that section, but were rather defaults than acts or practices,



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and entirely unconnected with corrupt practices. What is referred to in sec. 159, is systematic illegality, whether amounting to corruption or falling short of it, to such an extent that the particular acts which are proved, may be reasonably considered merely to be instances in connection with the general system of corruption or illegality which has been prevalent during the contest. *Prescott Election (Ont.)—Cunningham v. Hagar*, 1 E. C. 88.

Held, per Boyd, C., that but one corrupt practice was proved in this case, and that in view of the provisions of sec. 159 of the Act that one was not sufficient to avoid the return. *East Middlesex Election (Ont.)—Rhoder v. McKenzie*, 1 E. C. 250.

Held, per Boyd, C., that inasmuch as respondent's personal expenses had not amounted to \$100, and as, during the canvass, although he had treated friends, he had not done so to any greater extent than had previously been his habit, neither his personal conduct during the election nor the absence from the trial of one of his chief agents, against whom considerable suspicion was raised by the evidence, ought to prevent the court from applying the provisions of sec. 159 to the circumstances of this case. Held, per Cameron, J., that though nothing corrupt or unusual was proved as to respondent's expenses or treating, he had not properly returned his personal expenses, and this circumstance, coupled with the keeping out of the way at the time of the trial of one of his chief agents, should prevent respondent receiving the benefit of sec. 159 of the Act, and the election should be avoided. On appeal:—Held, Osler, J.A., dissenting, that upon the evidence the election was saved under the provisions of sec. 159. *Ib.*

At a polling sub-division, through a series of mischances, and without any wilful default of the officials the poll was not opened till between half-past one and two, whereby it was charged a number of electors were deprived of voting. The petitioner failed to prove the charge, while, if the onus of doing so were on the respondent, he shewed there was ample time to poll all the votes at that sub-division, and all who desired to vote could have done so; The supply of ballot papers at a polling sub-division, through a blunder of the officials, ran out, and, while waiting for instructions the poll was closed for half an hour, whereby, it was charged, some seventeen voters were prevented from voting; but as a matter of fact none of these voters were prejudiced thereby; the deputy-returning officer and subordinate officers at a polling sub-division, through improvidence, but not malafide, did not make the declaration of secrecy required by s. 147 of R. S. O. c. 10; but the result was not affected thereby:—Held, by the trial judges, Boyd, C., and Cameron, J., that as these grounds of irregularity did not per se affect the result, they came within the protection of s. 197, and did not avoid the election. *East Simcoe Election (Ont.)—Reid v. Drury et al.*, 1 E. C. 291.

Boyd, C., that though the acts of the agent in this case were clearly corrupt acts, they did not avoid the election as they came within the protection of s. 159; and per Cameron, J., that they did avoid the election, as they were not within the said protection. Per Boyd, C.—The scope of the section was that an election

should not be set aside for two or three illegal acts of a trifling nature or extent, where the majority is considerably more than the vote affected, unless these illegal acts and practices prevailed, and were so influential, extensive and insidious, as to induce the probable and reasonable belief that but for such acts and practices the result might have been different, while here, after striking off the corrupt votes, the respondent would still have a majority. Per Cameron, J.—The extent of the influence of the corrupt acts is not to be measured or estimated merely by the number of corrupt votes, but in connection with the influence of the party proved to be guilty of its commission, and by the opportunities he may have had of resorting to like practices in other cases. On appeal to the Court of Appeal:—Held, affirming the finding of Cameron, J., (Burton, J. A., dissenting,) that the corrupt acts did not come within the protection of s. 159, and therefore the election was avoided. *Ib.*

Irregularities at nomination. See *East Simcoe Election (Ont.)—Reid v. Drury et al.*, 1 E. C. 291 p. 483.

See *North Ontario Election (Ont.)—Treleaven v. Gould*, 1 E. C. 1, p. 490.

## XI. TRIAL OF CONTROVERTED ELECTIONS.

### 1. Petition.

The election petition against the election and return of the respondent was entitled in the High Court of Justice, Queen's Bench Division, and was presented to the official in charge of the office of the Queen's Bench Division, and filed and entered in the books of that office. A preliminary objection was taken that the High Court of Justice had no jurisdiction:—Held, (Henry and Taschereau, J.J., dissenting), reversing the judgment of Cameron, J., 1 O. R. 433, that the Ontario Judicature Act, 1881, makes the High Court of Justice, and its Divisions, a continuation of the former courts merged in it, and that those courts still exist under new names, and that the petition had not been irregularly entitled and filed. *Mitchell v. Cameron*, 8 S. C. R. 126.

An allegation in the petition "that the respondent was by himself, &c., guilty of corrupt practices as defined by the Controverted Elections Act of Ontario" sufficiently charges the commission of corrupt practices under secs. 152 and 153 of the Election Act, R. S. O. c. 10. *North Ontario Election (Ont.)—Treleaven v. Gould*, 1 E. C. 1.—Burton—Osler.

See *West Simcoe Election (Ont.)—Bedford v. Phelps*, 1 E. C. 128, p. 501.

### 2. Particulars.

The petitioner, in his particulars delivered herein, charged the respondent with giving or causing to be given meat, drink, and refreshment to voters on polling day on account of their having voted or being about to vote, being a corrupt practice under R. S. O. c. 10, s. 153. The petition itself, however, merely charged that the respondent "before, during, at, and after the said election, was by his agents and by other persons on his behalf guilty of corrupt practices as defined by the Controverted Elections Act of Ontario, R. S. O. c. 11, s. 2:—Held, at the trial, that this

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in requiring petitioners to file an affidavit with  
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lieve and do believe the statements contained in  
the petition to be true in substance and in fact,  
and, moreover, the charge being only by refer-  
ence to a statute, the affidavit in such case could  
only be intelligently and honestly made by one  
who had informed himself of the provisions of  
the statute and applied to them some definite  
construction, and in any event the deponent  
would only be swearing to his own construction  
of the statute, without stating what that con-  
struction was:—Held, further, that inasmuch as  
"corrupt practices," so far as defined at all by  
R. S. O. c. 11, were declared to mean "bribery,  
treating, and undue influence, or any of such  
offences, as defined by this or any other Act of  
the Legislature, or recognized by the common  
law of the Parliament of England," and also the  
violation of certain specific sections of R. S. O.  
c. 10, among which sec. 153 was not included,  
and inasmuch as acts prohibited by sec. 153 were  
clearly not corrupt practices under the common  
law of Parliament, nor is there any definition of  
"treating" in any of the Acts of our Legislature,  
and therefore nothing to show that it covers  
offences under sec. 153, and therefore inasmuch  
as there might be extended upon the face of the  
petition every offence covered by the description  
or definition of corrupt practices contained in the  
Controverted Elections Act of Ontario, and yet  
there would not be amongst them any charge  
under sec. 153; therefore, the petitioner could  
not succeed in avoiding the election upon any  
charge under sec. 153, as he sought to do here,  
unless allowed to add it by way of amendment  
to his petition. On the cross-appeal of the peti-  
tioner on this point no judgment was given, the  
disposition of the respondent's appeal rendering it  
unnecessary to do so:—Held, further at the trial,  
that such amendment could not be allowed, for  
R. S. O. c. 11, s. 9, sufficiently shews that the  
court has no jurisdiction to allow such an amend-  
ment, notwithstanding sec. 2, sub-sec. 1, and sec.  
43, of that Act, as does also the requirement of  
an affidavit under sec. 11. *Maude v. Lowley*,  
L. R. 9 C. P. 165, followed; *Re Election for the*  
*Electoral Division of the County of Monck*, H. E.  
C. 154, 32 Q. B. 147, distinguished. *West Simcoe*  
*Election (Ont.)—Bedford v. Phelps*, 1 E. C. 126.

#### 3. Amendment.

See *West Simcoe Election (Ont.)—Bedford v.*  
*Phelps*, 1 E. C. 128, *supra*. See also *South Vic-*  
*toria Election (Ont.)—Rodden v. McIntyre*, 1 E.  
C. 195.

#### 4. Dismissing Petition for Delay in Prosecuting.

An order may be made extending the time for  
the trial of an election petition under 38 Vict. c.  
10, s. 2 (Dom.), notwithstanding that six months  
have elapsed since the presentation of the peti-  
tion, and though the application for such ex-  
tension is not made within the six months. *Re*  
*West Middlesex Election (Ont.)—Walker v.*  
*Ross*, 10 P. R. 27.—*Armour*.

Seemle, if the trial be not commenced within  
the six months the respondent should move to  
dismiss the petition. *Ib.*

#### 5. Evidence.

The election petition in this case complained  
of the return of the respondent as member elect  
for the county of Megantic, (P. Q.) for the  
House of Commons. The petition was met by  
preliminary objections, in which the sitting  
member alleged, *inter alia*, that the petitioners  
were not electors, nor qualified to vote at the  
election in question, &c. A day having been  
fixed for the hearing of these preliminary objec-  
tions, no evidence was given upon them, and  
they were dismissed by Plamondon J., who held  
following the practice adopted by the Superior  
Court of Quebec, sitting as an election court in  
the *L'Islet* case, *Duval v. Casgrain*, 19 L. C. Jur.  
16, that the onus probandi was on the respondent  
to support such objections. On appeal to the  
Supreme Court of Canada, Fournier, Henry and  
Gwynne, JJ., were of opinion that the onus pro-  
bandi was on the appellant, who by his prelim-  
inary objections had affirmed the disqualification  
of the petitioner. *Contra*, Ritchie, C. J., and  
Strong and Taschereau, JJ. The court being  
equally divided, the judgment of the court below  
stood affirmed with costs. *Megantic Election*  
*(Dom.)—Fréchette v. Goulet et al.*, 8 S. C. R. 169.

At the trial of the petition, the returning of-  
ficer, who was also the registrar of the county of  
Megantic, and secretary of the municipality of  
Inverness, was called as a witness, and produced  
in court in his official capacity the original list  
of electors for the township of Inverness, and  
proved that the name L. McML, one of the peti-  
tioners whom he personally knew, was on the  
list. The original document was retained by  
the witness, and as neither of the parties re-  
quested that the list should be filed, the judge  
made no order to that effect. The status of the  
other petitioners was proved in the same way:  
—Held, that there was sufficient evidence that  
the petitioners were persons who had a right to  
vote at the election to which the petition related  
under 37 Vict. c. 10 s. 7 (Dom.) *Megantic Ele-*  
*ction—Cote v. Goulet*, 9 S. C. R. 279.

The shorthand notes of the shorthand writer  
employed by the court to take down the evidence  
were not extended in his handwriting, but were  
signed by him:—Held, that the notes of evidence  
could not be objected to. *Ib.*

See *East Middlesex Election (Ont.)—Rhoder v.*  
*McKenzie*, 1 E. C. 250, p. 493.

#### 6. Judges' Report.

At a Provincial election trial before Cameron,  
J., and Boyd, C., Cameron, J., certified that they  
differed in their judgments as to whether the re-  
spondent was guilty of a corrupt practice under  
sec. 161 of the Election Act, R. S. O. c. 10, in  
paying or consenting to the payment of the trav-  
elling expenses of certain voters to convey them  
to the poll; and he further certified that the said  
respondent was proved guilty of the said corrupt  
practice. Boyd, C., also certified as to the differ-  
ence of opinion; and further certified that the  
said respondent committed an illegal act under  
sec. 154 in sanctioning the payment of voters'  
travelling expenses at such election, but without  
any corrupt intent, and in ignorance which was  
involuntary and excusable, under a belief that so

long as he did not personally bear or pay the said expenses it was not illegal, and under the fullest belief that the said voters were bound or were willing to repay the said expenses, or allow them to be deducted from their wages:—Held, that under the Act in question, R. S. O. c. 11, the judges must concur in finding that the respondent had been guilty of a "corrupt practice;" and that there was such concurrent finding here; for although the finding of Boyd, C., was that the act was an "illegal act," such illegal act, under sec. 2, sub-sec. 6, is made a corrupt act; and that the respondent was therefore disqualified; and that as there was not a concurrent finding under sec. 162, such disqualification was not removed; and that this was not affected by the Act 47 Vict. c. 4, s. 48 (Ont.), as in this respect that Act was not retrospective. *Renfrew Election (Ont.)—Harvey v. Dowling*, 1 E. C. 70.—Burton—Galt. See 48 Vict. c. 2 (Ont.)

Per Osler, J. A. One joint report of the trial judges under the hands of both is not essential; but there may be two separate reports each under the hand of one of the judges; but:—Quere, whether the certificate under R. S. O. c. 11 s. 55 of the result of the trial should be joint; but that this was not now open to the respondent, for by his becoming a candidate at the subsequent election he must be taken to admit that the former election was on some ground or other regularly set aside. *South Renfrew Election (Ont.)—Harvey v. Dowling*, 1 E. C. 359.

#### 7. Practice in Appeal.

Held, that the Supreme Court, on appeal, will not reverse on mere matters of fact the judgment of the judge who tries an election petition, unless the matter of the evidence is of such a nature as to convey an irresistible conviction that the judgment is not only wrong, but is erroneous, and that the evidence in support of the charge of bribing one M., as well as of the other charges of bribery and treating, was not such as would justify an Appellate Court in drawing the inference that the respondent intended to corrupt the voters. *Montcalm Election (Dom.)—Magan et al. v. Dugas*, 9 S. C. R. 93.

The judgment of the court below will not be reversed unless clearly wrong. *Berthier Election (Dom.)—Genereux et al. v. Cuthbert*, 9 S. C. R. 102.

At the trial it was found on a review of the evidence that an offer to bribe, which had not been carried out, was not proved:—Held, on appeal, that the finding of the trial judges should not be disturbed unless the court above was convinced that it was wrong, and that if no more could be said than that the evidence might have warranted a different conclusion, it should not be interfered with. *Prescott Election (Ont.)—Cunningham v. Hagar*, 1 E. C. 88.

Per Osler, J. A.—On a proceeding in cases like the present, the whole case is before the Court of Appeal on the evidence, and ought to be disposed of in all respects as on an appeal from the trial judges. *East Simcoe Election (Ont.)—Reid v. Drury et al.*, 1 E. C. 291.

See also *Kennedy v. Braithwaite*, 1 E. C. 195.

#### 8. Costs.

A petition under the Ontario Controverted Elections Act, R. S. O. c. 11, was dismissed, with costs:—Held, on appeal, reversing the decision of one of the taxing officers, that under secs. 97 and 100 of R. S. O. c. 11, the respondent was not entitled to tax against the petitioners the costs of interviewing before the trial persons named in the petitioner's bill of particulars as bribers and bribees. *Re West Middlesex Election—Johnson v. Ross*, 10 P. R. 509.—Rose.

See *Garrett v. Roberts*, 10 A. R. 650, p. 505.

#### XII. ACTIONS FOR PENALTIES.

At the election of a member of the Legislative Assembly of Ontario, in and for the district of Algoma, six persons tendered their votes and offered to take the necessary oaths required by the Election Act, R. S. O. c. 10, to entitle them to vote. The deputy returning officer refused the vote of one because he could not produce his title deeds, and of the others because they had no houses on their lands. Four of those rejected offered to take the oath prescribed and described the property on which they claimed to vote. In an action for penalties for refusing the votes:—Held, that the duties of a deputy returning officer in taking the votes are ministerial, (save where he suspects personation, want of qualification, &c.; in which case he should exercise his judgment as to administering the oath), and that having refused the tendered votes of those who had sufficiently shewn their right to vote, he had refused to perform an obligation or formality, required of him within sec. 180, and was liable to the penalties prescribed by the Act. One Anderson, when tendering his vote, was not able to describe his land accurately, but stated that it was in one of three townships which he named. His vote was refused on the ground that he had no house on his land:—Held, Hagarty, C. J., doubting, that the deputy returning officer was liable for the penalty for refusing this vote:—Held, also, that the point as to whether the polling division in question was within Ontario or not, could not be raised by the deputy returning officer acting under a writ for an election in Ontario:—Held, also, that notice of action was not necessary, nor was it necessary to aver or prove notice. *Walton v. Appjohn*, 5 O. R. 65—Q. B. D.

Action by the plaintiff, a defeated candidate at an election for the Local Legislature, against the defendant, the returning officer, for wilfully contravening the provisions of R. S. O. c. 10, s. 125, in not delaying his return after receiving notice from the County Judge of a recount of the ballots. The County Judge had mailed a notice to the defendant, which it was not controverted had reached him in time, and a duplicate of it was left at his residence with his wife:—Held, affirming the judgment of Wilson, C. J., at the trial, Cameron, C. J., dubitante, that the evidence, set out in the report, did not shew that the notice came to defendant's knowledge before he made his return, and therefore he did not contravene the section, so that there could be no recovery:—Per Cameron, C. J., doubting, on the ground that the defendant had not affirmed by his oath that the fact of a recount did not come to his knowledge before he made his return. *Hays v. Armstrong*, 7 O. R. 621—C. P. D.



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#### PENALTIES.

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Held, per Wilson, C. J., that the plaintiff was a "person aggrieved" within sec. 181 of the Act; and that the defendant could not question the power of the County Judge to give the appointment or issue the notice on the material before him, because the process of the court or judge must be obeyed while it stands when, as here, there was jurisdiction. *Ib.*

Held, that 18 Elizabeth, c. 5, which enacts that an informer shall sue either in person or by attorney, is in force in this province, and therefore the plaintiff, an infant suing by his next friend, could not maintain an action for a penalty under the Election Act. The appellant having omitted to take this objection in the court below, this court in allowing the appeal on that ground, refused him his costs of appeal. *Garrett v. Roberts*, 10 A. R. 650.

A person who sues for a penalty given by the Election Act is a common informer. *Ib.*

The acts of bribery complained of were committed between the 13th and 23rd of June, 1882. The writ was issued on the 12th June, 1882, and was served on the defendant on the 27th November thereafter. The defendant on the 30th November, moved to dismiss the action for wilful delay in prosecution under 39 Vict. c. 9, (Ont.). The plaintiff's solicitor swore that he was also solicitor for the petitioner in the Lennox election petition, at which election the acts of bribery complained of were alleged to have been committed, and in order not to endanger the success of that petition it was deemed advisable not to serve the writ until that petition was disposed of, which, on account of objections to the jurisdiction, was not tried till the 10th October, 1883. He also deposed that at the trial of the election petition an application was made for a summons against the defendant under 39 Vict. c. 9, to have the penalties for bribery imposed upon him; and that the application was not disposed of till the 23rd November, at which date the judge declined to interfere:—Held, that such delay as would not expose an ordinary suit to dismissal may be fatal to an action under this Act, under the special provision that such an action shall be carried on without wilful delay:—Held, also, there had been wilful delay not to be excused by the explanations given, and that the plaintiff was entitled as of right to have the action perpetually stayed or dismissed. *Miles v. Roe*, 10 P. R. 218.—Boyd.

The order in this case was made, dismissing the action without costs, for the reason that a prima facie case of bribery was established against the defendant, which he had not attempted to contradict. *Ib.*

The jurisdiction of the Provincial Legislature over "property and civil rights" does not preclude the Parliament of Canada from giving to an informer the right to recover, by a civil action, a penalty imposed as a punishment for bribery at an election. *Doyle v. Bell*, 11 A. R. 326.

The Dominion Election Act 1874, by sec. 109, provides that all penalties and forfeitures (other than fines in cases of misdemeanour) imposed by the Act shall be recoverable, with full costs of suit, by any person who will sue for the same, by action of debt or information, in any of Her Majesty's Courts in the province in which the

cause of action arose, having competent jurisdiction:—Held, that this enactment was valid. *Ib.*

See *Strigley v. Taylor*, 6 O. R. 108, p. 482.

#### PAROL CONTRACT.

See CONTRACT.

#### PAROL EVIDENCE.

See EVIDENCE.

#### PARTICULARS.

I. IN ACTIONS FOR DEFAMATION—See DEFAMATION.

II. IN ELECTION TRIALS—See PARLIAMENTARY ELECTIONS.

III. IN PATENT SUITS—See PATENT FOR INVENTION.

Where the plaintiff was not aware of the defence intended, qualified particulars of a defence of not guilty by statute were ordered. *Jennings v. The Grand Trunk R. W. Co.*, 11 P. R. 300.

#### PARTIES.

See PLEADING.

#### PARTITION.

I. WHEN PARTITION AWARDED, 506.

II. PRACTICE, 507.

III. EFFECT OF JUDGMENT IN PARTITION, 507.

##### I. WHEN PARTITION AWARDED.

The Crown, by letters patent, granted land to F. B. for life, with remainder to her children, the petitioners, as tenants in common in fee simple. On a petition presented to the judge of the County Court, under R. S. O. c. 101, for partition or sale, a sale was ordered. A motion for a prohibition was made on behalf of F. B., the tenant for life:—Held, Armour, J., dissenting, that the case did not come within the Partition Acts, and that there was no power to compel a sale of the lands as against the tenant for life. A prohibition was therefore ordered. *Murcar et al. v. Bolton et al.*, 5 O. R. 164.—Q. B. D.

A person entitled only to dower, unassigned, out of land, is entitled to apply for partition. *Rody v. Rody*, 1 C. L. T. 146, overruled. But where one only of several is desirous of partition, all that that one is entitled to is to have his or her portion set aside, leaving the others to hold jointly or in common, as before. *Hobson v. Sherwood*, 4 Beav. 184, followed. *Devereux v. Kearns et al.* 11 P. R. 452.—Ferguson.

Where the dowress applied for partition or sale, confessedly with the object of obtaining the latter, and all the other parties opposed it, and it appeared that the applicant had by another proceeding obtained the right to have her dower assigned out of the lands, the application was refused, with costs. *Id.*

## II. PRACTICE.

Sales by the court of real estate held in co-tenancy are governed by the provisions of the Partition Act, R. S. O. c. 101; and masters should not, without any special or sufficient reasons, dispense with enquiries and advertisements for creditors holding special or general liens upon the whole or any undivided share of the estate, but should ascertain and report what encumbrances affect the property, or any undivided share of the estate, down to the time of sale, and not merely at the time when the order under G. O. Chy. 640 is made. *Robson v. Robson*, 10 P. R. 324.—Boyd.

When proceedings for a partition in a County Court have terminated by an order confirming such partition, and nothing remains to be done by way of enforcing the judgment, such judgment cannot afterwards be impeached on the ground of fraud or deception on the Court otherwise than in resisting an action in which it is relied on, or by bringing an action for the express purpose of setting it aside. *Jenking v. Jenking et al.*, 11 A. R. 92.

Power of master on a reference for partition or sale of lands to try the validity of a lease, or a fraudulent alteration in a sealed instrument. See *Re Rogers—Rogers et al. v. Rogers et al.*, 11 P. R. 90.

## III. EFFECT OF JUDGMENT IN PARTITION.

See *Van Velsor et al. v. Hughson*, 9 A. R. 390, p. 242.

## PARTNERSHIP.

### I. PARTNERSHIP CONTRACT, 507.

### II. LIABILITY OF PARTNERS.

#### 1. On Bills or Notes, 509.

### III. ACTIONS FOR PARTNERSHIP ACCOUNTS, 510.

### IV. PARTIES IN ACTIONS—See PLEADING.

### V. EXECUTIONS AGAINST, 510.

### VII. DEATH OF PARTNER, 510.

### VII. MISCELLANEOUS CASES, 510.

### VIII. PARTNERSHIP AND SEPARATE CREDITORS —See BANKRUPTCY AND INSOLVENCY.

#### I. PARTNERSHIP CONTRACT.

M. & G. met and agreed to jointly purchase 150 acres of land and to sell it in lots, or perhaps en bloc, to a syndicate, if one could be got up. Both parties knew that others were interested under each of the two principals. M. had one-third interest and G. had two-thirds. No syndicate was got up to take the whole, and G.

telegraphed M. that he was going to arrange a syndicate for two-thirds, and he formed a syndicate of eight persons, of whom he was one, to purchase his two-thirds interest, and obtained a large profit thereon. This arrangement was made in writing, and recited that G. was seised in fee of the lands, and had executed a declaration of trust of one-third in favour of M., and "executes this declaration as to the remaining two-thirds." A quit claim deed was afterwards executed by M. in favour of G., and a declaration of trust as to one-third in favour of M., was signed by G. In an action by M. for a share of G.'s profit, it was:—Held, that there was no sale of any of the lots that belonged to M. The two-thirds had not been disposed of so as to pass out of the partnership, though as to them there might be a sub-partnership; there had been no dealing with the joint property of the partnership, but only of the individual interest of one partner; he had sold some portion of his individual share and no injury had resulted to his partner, and even if any had it would be no more than one of the inevitable concomitants attendant upon the right of one member to deal as he pleases with his share of the partnership concern. The action was therefore dismissed, with costs. *Mitchell v. Gornley*, 9 O. R. 139.—Boyd. Affirmed, 14 A. R. 55.

The respondents having on hand large contracts to fulfil, entered into partnership with the appellant under the style of J. W. & Co. The respondent A. P. M. subsequently filed a bill in Chancery against W., the appellant and his two sons co-partners, asking for a decree declaring him and his two sons entitled to receive credit to the amount of \$40,000, the estimated value of certain plant, etc., used in the construction of the works done by the partnership. The article in the deed of partnership executed before a notary public in the province of Quebec, under which the respondent claimed to be entitled to credit of \$40,000, is as follows: "The stock of the said partnership consists of the whole of the plant, tools, horses and appliances now used for the construction of said works by the said parties of the first part A. P. M. & Sons; also all quarries, steam tugs, scows; and also all the rights in said quarries that are held by the said parties of the first part, or any of them, the whole of which is valued at the sum of \$40,000, and is contained in an inventory thereof hereto annexed for reference after having been signed for identification by the said parties and notary; but whereas the said plant, tools, horses, appliances, steam tugs, scows, quarries and other items had been heretofore sold by the said party of the first part to the firm of M. & W., of the city of Montreal, hardware merchants, to secure them certain claims which they had against the said A. P. M. & Co., for moneys used in the construction of the works referred to, to the extent and sum of about \$24,000 and interest; and whereas the said J. W. has paid said amount of \$24,000 and redeemed said plant, tools, horses, and appliances, and quarries, steam tugs, and scows, &c., and now stands the proprietor of the same under a deed of conveyance; it is hereby well agreed and understood that the said plant, tools, horses, and appliances that are or may be put on the said work shall be and continue to be the entire property of the said J. W. until such time as he shall have realized and received

going to arrange the business of the present partnership a sum sufficient to reimburse him of the said sum of \$24,000 and interest so advanced to him as aforesaid, as also any other sum or advances and interests which shall or may be made or advanced to the present firm or partnership, after which time and event the whole of the said stock shall become the property of the said firm of J. W. & Co., that is to say: That one-half thereof shall revert to and belong to the parties of the first part, and the other half to the said party of the second part, as the said W. has a full half interest in this contract and all its profits, losses and liabilities, and the said A. P. M., W. E. M., and R. M., parties of the first part, jointly and severally, the other half-interest in the same." There was evidence that the plant had cost originally \$57,000, and that it was valued in the inventory at \$40,000 at the request of the appellant; it was also shown and admitted that the profits of the business were sufficient to reimburse the appellant the sum of \$24,000 and other moneys advanced, and that there was still a large balance to the credit of the partnership:—Held, varying the judgment of the court below, 7 A. R. 531, Henry and Gwynne, J.J., dissenting, that the plant, &c., furnished by the respondents having been inventoried and valued in the articles of partnership at \$40,000, the respondents had thereby become creditors of the partnership for the said sum of \$40,000, but as it appeared by the said articles of partnership that the said plant was subject at the time to a lien of \$24,000, and that said lien had been paid off with the partnership moneys, the respondents were only entitled to be credited, as creditors of the partnership, with the sum of \$16,000, being the difference between the sum paid by the partnership to redeem the plant and the value at which it had been estimated by both parties in the articles of partnership. *Worthington v. Macdonald*, 9 S. C. R. 327.

## II. LIABILITY OF PARTNERS.

### 1. On Bills or Notes.

The plaintiffs discounted a note for J. N., the maker, payable to and endorsed by a firm in the partnership name by one of the partners, the plaintiffs knowing that it was so endorsed as security for J. N., and having no reason to suppose that it was in connection with the partnership business:—Held, that the other partners were not liable. *Federal Bank v. Northwood et al.*, 5 O. R. 389—Q. B. D.

The defendant W. acted as agent for his co-defendants under a written agreement that no partnership should be created between them, or the parties held to be partners." To all appearance, however, W. acted as a partner and as such effected a sale to the plaintiff of a quantity of wine, &c., at ninety days' credit. Subsequently he applied to plaintiff for a loan of money for the purpose, as he stated, of retiring notes of customers of the firm, but which he told the plaintiff he was desirous of concealing from the other defendants, his so-called partners, and for the amount so borrowed he gave the promissory note of the firm:—Held, affirming the judgment of the court below that what transpired between W. and the plaintiff when lending the money, was sufficient to shew that

the advance had not been for partnership purposes, and therefore that the other defendants were not liable. *McConnell v. Wilkins*, 13 A. R. 438.

## III. ACTIONS FOR PARTNERSHIP ACCOUNTS.

Action against executor and surviving partner seeking to set aside a release and for an account. See *Burn v. Burn*, 8 O. R. 237.

In June, 1874, the plaintiff and defendant by writing entered into an agreement for supplying together the iron for the Grand Junction Railway, and providing for the division of the surplus or profits. No division of the profits was made and the defendant went on investing the receipts from that enterprise in other contracts, and the plaintiff claimed a like interest in them also, which the defendant denied his right to:—Held, that the onus of negating such right of the plaintiff rested on the defendant, and having failed to negative his right to such share, the court declared him entitled thereto, and directed a reference to take the accounts between the parties. *Cameron v. Bickford*, 11 A. R. 52. Reversed by Privy Council, not reported.

The fact that the plaintiff who had for some years acted as legal adviser of the defendant, was appointed one of the directors of the railway company at the same time that he claimed to be interested with the defendant in the contract for the construction of the road formed no ground for the defendant refusing to account to the plaintiff for his share of the profits of the enterprise. *Ib.*

See *Neil v. Park*, 10 P. R. 476, p. 539.

## V. EXECUTIONS AGAINST.

Sale of an indivisible chattel on execution against a co-owner. See *Gunn v. Burgess*, 5 O. R. 685.

Execution against the firm and against individual members of the firm. Priority. See *Bank of Toronto v. Hall*, 6 O. R. 653.

## VI. DEATH OF PARTNER.

Held, that a contract of hiring entered into with a firm by a commercial traveller is put an end to by the death of one of the partners. *Burnet v. Hope et al.*, 9 O. R. 10.—C. P. D.

## VII. MISCELLANEOUS CASES.

In an action on a promissory note, one member of a syndicate cannot ask to have a contract set aside by reason of misrepresentation, the other members not asking for a rescission; his remedy must be by cross-action or counter-claim for deceit. See *Morrison et al. v. Earls*, 5 O. R. 434.

The statement of one partner on his examination in a suit against the firm as to transactions which occurred during the partnership binds all the partners, unless they seek, by an examination of some of themselves, to contradict or qualify the statements of the partner whose evidence they object to. *Taylor v. Cook et al.*, 11 P. R. 10.—Dalton, Master.



that the combination of parts not in themselves producing no new result, was no invention, and that the machine formed the subject of the case, 11 S. C. R. 300.

an alleged invention of a Black Leaf Cheque Book, and that the plaintiff, by his invention of a book of double leaves, together while the leaves, both being perforated, can be readily torn out, and the black leaf bound up, and provided with a lead foot, at effecting the same purpose by a slightly different method:—Held, that the plaintiff was entitled to judgment for an injunction against both defendants, but to a reference as to damages only as against C.:—Quære, whether it is correct to say that there can be no infringement of a combination unless the whole be pirated. *Foodward v. Clement et al.*, 10 O. R. 348.—

A patent for a horse rake, the specification of which described as part of the invention "the construction and novel arrangement of a divided axle, with wheels firmly fastened thereon, a friction gripe for engaging with the divided axle," &c.; the description of the construction and operation stating that "the axle being divided into two parts, permits the wheels to turn in opposite directions; a piece of iron or steel wire, or cord, or chain, is coiled round each half of the axle, one end of each coil being secured firmly to the rake head, while the other ends of the coil are secured to a foot treadle," &c. :—Held, not to be infringed by a rake worked by a strap passed twice or oftener round the inner part of the hub of the wheel elongated for the purpose of receiving it, one end of the strap being attached to the axle, and the other connected with the treadle :—Held, also, that the mode of using the cord was not novel, being essentially the same described in an earlier patent as consisting of "flexible metallic straps which encircle the inner extension of the hubs, one end of each strap being attached to a fixed bearing secured to the axle, and the other to the short end of a lever," &c. :—Semble, that neither the circle nor the coil was the subject of either invention, but only modes of using a friction band in connection with another device which was the patented improvement. *Per Hagarty, C. J. O.*—It was not patentable. *Sylvester v. Masson et al.*, 12 A. R. 335.

IV. PRIOR USE.

#### IV. PRIOR USE.

an article known as "the description of the wire, gusset, or seamed in groups and of coiled wire," and on against the de- siring a similar group instead of contin- group to group of wire and connected rod.—Held, merely nt, and that it was ever, that the sub- for India-rubber

Under the 7th and 8th sections of the Patent Act, 1872, persons who had acquired or used one or more of the patented articles before the date of the patent, or who had commenced to manu- facture before the date of the application, are not entitled to a general license to make or use the invention after the issue of the patent. The words in the 6th section of the Patent Act, 1872, "not being in public use or on sale for more than one year previous to his application in Canada," are to be read as meaning "not being in public use or on sale in Canada for more than one year previous to his application." *Smith v. Goldie*, 9 S. C. R. 46.

See *Lean v. Huston*, 8 O. R. 521, p. 518.

## V. RE-ISSUE OF PATENT

Where to an action to restrain certain alleged infringements of a re-issued patent, it was objected by way of defence that the re-issued patent

contained a combination not in the original patent or the application therefor, and was therefore invalid; and it appeared that the combination in question was manifested in the drawings and specifications of the original patent, but by mistake and inadvertence was not separated from the other parts of the description, and made the subject of a distinct claim, so as to be protected by the original patent:—Held, per Boyd, C., (affirming the decision of Ferguson, J.) that the re-issued patent was nevertheless valid. Proudfoot, J., dissentiente. Per Boyd, C.—What could have been claimed as part of the invention under the specifications and descriptions accompanying the patent, but was not by reason of error, mistake, or inadvertence, may be claimed on a re-issue if there has been no laches. Not what the patentee claims as his invention, but what is for the first time disclosed to the public on his application, is the measure of his rights on a re-issue. Per Proudfoot, J.—A re-issued patent must be for the same invention as that embraced and secured in the original patent. It is a misconstruction of the Patent Act of 1872 to say it authorizes a re-issue “with broader and more comprehensive claims,” if by that be meant that it authorizes a re-issue with a claim not in the original patent at all; neither is it enough to justify a re-issue that all the elements of the new claim may be found in the specifications of the original patent; but if the claim is so imperfectly described, through error or mistake, as not to cover the invention, then a re-issue may be had. The earlier decisions in the United States are more in conformity with the language and intention of our Patent Acts than the later decisions, which seem to recognize the right in the re-issue to broaden the claims in a manner which the law does not appear to justify. *Withrow et al. v. Malcolm et al.*, 6 O. R. 12—Chy. D.

Held, that the delay (without any excuse) of a patentee for a period of a little more than a year and nine months, after full knowledge of an inadvertence and mistake in his original patent, and after professional advice on the subject, and after a re-issue of the same patent in the United States, founded upon the same alleged inadvertence or mistake (during which period manufacture had been carried on in the United States under a re-issue there), before the application for a re-issue in this country, is fatal to the validity of the re-issue here. *Kühler et al. v. Smart et al.*; *Kühler et al. v. Smart Manufacturing Co., Brockville (Limited)*, 8 O. R. 362.—Ferguson.

## VI. PURCHASE AND ASSIGNMENT.

On 1st June, 1877, C. P., the owner of a patent for an improved pump which had only about a month to run, but was renewable for two further terms of five years each, agreed to sell to P. et al., his pump patent for five counties, and by deed of same date he granted, sold and set over to P. et al., "all the right, title, interest which I have in the said invention as secured by me by said letters patent for, to and in the said limits of the counties of," &c. The habendum in the deed was "to the full end of the term for which the letters patent are granted." The consideration was \$4,500, of which \$1,500 was paid down, and mortgages given on the land on which the business was carried on, and on the chattels

for the residue. The patent expired on the 19th July, 1877, and C. P. renewed it in his own name for the further term of five years, and P. et al. having made default in June, 1878, C. P. filed his bill asking for payment of the balance of purchase money, or in default for sale of the land. Almost at the same time time P. et al., brought a suit against C. P. to enforce specific performance of the agreement for sale of the patent right for the full period to which C. P. was entitled to renew the same under the patent laws:—Held, in the suit *Peck et al. v. Powell*, reversing the judgment of the Court of Appeal, that under the agreement and assignment plaintiffs were entitled to the extension as well as the current term. And in the suit *Powell v. Peck et al.*, 8 A. R. 498, affirming the judgment of the Court of Appeal, that C. P. was entitled to a decree for the redemption or foreclosure of the mortgaged premises with costs. Per Henry and Gwynne, JJ., that the decrees in the Court of Chancery should be consolidated and the decree for sale in default of payment in the suit of *Powell v. Peck et al.*, delayed until P. had assigned the renewal term. *Peck v. Powell*, 11 S. C. R. 494.

In 1875 J. R. obtained letters patent for improvements in "harvesters," and sold and assigned to the plaintiffs the exclusive right to manufacture and sell the same, and to sell such right to other persons. In the same year the plaintiffs executed a deed to the defendant, assigning to the defendant the exclusive right to manufacture and sell such "Harvesters" in certain counties, he paying \$10 royalty on each one to be manufactured by him. It was then covenanted by and on the part of the plaintiffs that the original patentee, J. R., would warrant and defend the defendant in the possession of the said patent within the territory thereby granted, and further agreed that if J. R. neglected or refused to protect and defend him in his peaceable possession of the said patent, then the royalty agreed to be paid by him should cease. Per Hagarty, C. J. O., and Morrison, J. A., that the plaintiffs under this covenant were liable only to the defendant in case J. R. neglected to defend him against all persons having a right to manufacture and sell the machines, not as against mere wrong doers. Per Burton and Patterson, JJ. A., that the terms of the covenant bound J. R. to protect the defendant against all infringers, the rule of construction of covenants to "warrant and defend," as applied to lands, not having any application in cases like the present. *Green et al. v. Watson*, 10 A. R. 113.

The plaintiffs being the patentees of a certain article, by memorandum in writing, under seal, reciting that they were the inventors of the article in question, assigned all their interest in the patent to the defendant for a certain district or territory in consideration of certain royalties and sums of money therein agreed to be paid by him. In an action to recover the consideration in which the evidence of the defendant went to shew that he knew before the first year after the making of the contract had expired that others were manufacturing the patented article, but he did not complain or repudiate the transaction, or refuse to pay, or offer to re-assign, or require the alleged infringers to desist, or call upon the patentees to vindicate their patent, and that he

had a profitable user of the invention to a substantial extent:—Held, that in the absence of fraud, or warranty, or representation which induced the bargain and was falsified in the result such a contract was simply for the purchase of an interest in an existing patent. No assumption arises, and no implication is to be made that the patent is indefeasible. The plaintiffs were therefore held entitled to judgment. *Smith v. Neale*, 2 C. B. N. S. 67, and *Hall v. Conder*, 2 C. B. N. S. 22, commented on; *Hayne v. Maltby*, 3 T. R. 438, and *Saxton v. Dodge*, 37 Barb. (N.Y.) 84, distinguished. *Vermilyea v. Caniff*, 12 O. R. 164.—Boyd.

#### VII. JURISDICTION OF MINISTER OF AGRICULTURE.

Held, that the minister of agriculture or his deputy has exclusive jurisdiction over questions of forfeiture under the 28th sec. of the Patent Act, 1872, and a defence on the ground that a patent has become forfeited for breach of the conditions in the said 28th sec., cannot be supported after a decision of the minister of agriculture or his deputy declaring it not void by reason of such breach: Per Henry, J.—The jurisdiction of the commissioner is administrative rather than judicial, and he may look at the motive and effect of an act of importation, and a single act, such as the importation of a sample tending to introduce the invention, is not necessarily a breach of the spirit of the conditions of the 28th sec. *Smith v. Goldie*, 9 S. C. R. 46.

Sec. 28 of the Patent Act of 1872, after specifying certain cases in which patents are to be null and void, provided that in case disputes shall arise under this section as to whether a patent has or has not become void, such disputes shall be settled by the minister of agriculture or his deputy, whose decision shall be final:—Held, that a court or judicial tribunal for the determination of the matters referred to in the section was constituted by the Act; that the constitution of such a court was not ultra vires of the Dominion Parliament as infringing Provincial legislation; and that it was competent for the minister to decide as to the existence of disputes arising for his decision. Prohibition therefore was refused. *In re The Bell Telephone Co. and the Telephone Manufacturing Co. and the Minister of Agriculture*, 7 O. R. 605.—Osler.

On a motion for a writ of certiorari to bring up into this court all the proceedings, &c., before the minister of agriculture, including his decision therein, on an application made before him to have a patent declared void for non-compliance with the provisions of sec. 28 of the Patent Act of 1872:—Held, that the minister of agriculture, or his deputy, had jurisdiction under sec. 28 to decide any dispute as to whether a patent had become void for non-observance or violation of the provisions of that section. *In re The Bell Telephone Company*, 9 O. R. 339—C. P. D.

Seemle, that the minister's duties are ministerial, and therefore cannot be reversed or reviewed in a course of law; but, even if judicial, this court cannot interfere on the ground of a total want of jurisdiction on the minister's part to make the inquiry, for, so far at least as this court was concerned, this must be considered as



invention to a sub-  
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representation which in-  
falsified in the result  
for the purchase of  
patent. No assumption  
is to be made  
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to judgment. *Smith*  
and *Hall v. Conder*,  
decided on; *Hayne v.*  
*Saxton v. Dodge*, 37  
ished. *Vermilgea v.*  
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MINISTER OF AGRICUL-

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as competent for the  
existence of disputes  
Prohibition therefore  
*Bell Telephone Co. and*  
*g Co. and the Minister*  
—Osler.

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judicata by the decisions of *Smith v. Goldie*, 9 S.  
C. R. 46, and *Re Bell Telephone Co. and Minis-*  
ter of Agriculture, 7 O. R. 605; nor was there  
a partial want of jurisdiction, by reason of the  
neglect of the minister to examine witnesses on  
oath or his refusal to issue summonses for wit-  
nesses to attend before him, because under sec.  
28 this was not required. Quere, whether also,  
if judicial, the Provincial Courts have jurisdic-  
tion to interfere with such a tribunal, it being,  
on this assumption, a Dominion court. A writ  
of certiorari was therefore refused. *Ib.*

Semble, that on an application to question a  
patent under the statute the intervention of the  
attorney-General is not essential. *Ib.*

## VIII. ACTIONS RELATING TO PATENTS.

### 1. Particulars.

In an action for infringement of a patent the  
defendants denied (4) the novelty of the inven-  
tion, and (6) that the plaintiff was the first and  
true inventor:—Held, *Boyd, C.*, dissenting, that  
the defendants should deliver particulars under  
these defences, shewing in what respects the de-  
fendants deny the plaintiffs' patent was for any  
new machine, &c., and the dates and occasions  
when, and also the names of the persons by whom  
the prior user was had. Per *Boyd, C.*—In the  
absence of any legislation or rules of court upon  
the subject, the judge has no power or right to  
prescribe so minutely what shall be disclosed in  
the particulars. The statute 35 Vict. c. 26, s. 24  
(Dom.), goes no further than to justify such gen-  
eral order for particulars as is usual in other  
cases. *Mills v. Scott*, 5 Q. B. 360, discussed.  
*Smith et al. v. Greay et al.*, 11 P. R. 169—Chy. D.

### 2. Damages.

In a patent action the judgment of the Su-  
preme Court of Canada declared that the plain-  
tiffs were entitled to an inquiry and to be paid  
the amount found due upon such inquiry for  
damages sustained from the making, construct-  
ing, using, selling, or vending to others to be  
used, by the defendants, and by the persons to  
whom they have sold, given, or let the same of  
any of the machines, &c. The judgment gave  
relief beyond what the plaintiffs asked by their  
bill of complaint. Held:—That where the lan-  
guage of the decree is unambiguous, the allega-  
tions in the pleadings should not be taken into  
account in the inquiry as to damages, and there-  
fore the Master was wrong in excluding evi-  
dence of damages to the plaintiffs by the use of ma-  
chines by persons who had bought them from  
the defendants. *Smith et al. v. Goldie et al.*, 11  
P. R. 24.—Proudfoot.

### 3. Other Cases.

The plaintiff sued the executors of D. D. C.  
for an account of all profit accrued to the estate  
of D. D. C., by reason of the use by him of a  
certain machine made by him in alleged infringe-  
ment of the plaintiff's patent, which profit con-  
sisted in the saving of expense to D. D. C.:—Held,  
on demurrer to the statement of claim, that the  
plaintiff had no remedy against the executors of  
D. D. C. in respect of such profit accrued to him

prior to his death. *Phillips v. Homfray*, 24 Chy.  
D. 439, discussed, and regarded as decisive in  
the present case. Semble, that if the statement  
of claim could mean that by reason of the wrong-  
ful act complained of, property of a tangible  
character, passed from the plaintiff's estate to  
that of D. D. C., as distinct from the saving  
of expense, the conclusion might be different.  
*Lestie v. Calvin et al.*, 9 O. R. 207.—Ferguson.

The general law applicable to discovery gov-  
erns in patent cases. A defendant may be pro-  
perly interrogated as to the grounds of his at-  
tacking a plaintiff's patent, and there should be  
a fair and full disclosure of the particular lines  
of attack which are contemplated, but no such  
individualizing of the persons who are alleged to  
be prior users as would enable the plaintiff to  
fix upon the defendant's witnesses. *Smith v.*  
*Greay et al.*, 10 P. R. 482.—Boyd.

## IX. MISCELLANEOUS CASES.

It is not illegal to manufacture and sell an  
article in this country which has been patented  
in the United States, and put upon it a state-  
ment that it is so patented, as a recommendation  
of it, so long as there is no infringement of a  
valid existing patent in this country. *Kidder et*  
*al. v. Smart et al.*; *Kidder et al. v. Smart Manu-*  
*facturing Co., Brockville (Limited)*, 8 O. R. 362.—  
Ferguson.

The plaintiffs were the patentees of a certain  
invention in the United States, and being de-  
sirous of having the article with some improve-  
ments patented in Canada, one of them employed  
one of the defendants, a mechanic, to make a  
model, and under the pledge of secrecy placed  
the United States patent in his hands and im-  
parted to him his ideas as to the improvements.  
It was afterwards discovered that the defendant  
so employed had, during his employment, taken  
out a patent for a similar article, under which he  
and the other defendants were manufacturing.  
In an action brought to set aside this patent and  
for an injunction restraining the manufacture by  
the defendants of the article, it was contended  
on the latter's behalf, that the article was not  
protected in Canada by the United States patent,  
and in fact that the idea was public property:—  
Held, following *Morison v. Moat*, 9 Ha. 241, that  
the plaintiffs had the right to succeed as to the  
injunction, and that their title was good as  
against the defendants, even though they might  
not have a good title against the public. *Lean*  
*v. Huston*, 8 O. R. 521.—Ferguson.

## PATENT FOR LAND.

See CROWN LANDS.

## PAYMENT.

### I. APPROPRIATION OF PAYMENTS, 519.

### II. RECOVERING BACK MONEY PAID.

#### 1. Under Protest, 519.

#### 2. In Error or Mistake of Fact, 520.

#### 3. Fraudulently Obtained—See MONEY.

## III. OF MORTGAGES—See MORTGAGE.

## IV. ON CONTRACTS FOR SALE OF GOODS—See SALE OF GOODS.

## V. PAYMENT OF MONEY INTO COURT.

1. *Voluntary Payments*, 521.
2. *In Actions*, 521.
3. *Interest Allowed*, 522.
4. *Attachment of*, 522.
5. *Other Cases*, 522.

## VI. PAYMENT OF MONEY OUT OF COURT.

1. *In Actions*, 523.
2. *When Paid in Security for Appeal*, 523.
3. *Other Cases*, 524.
4. *Stop Order*—See STOP ORDER.

## VII. OF PREMIUM—See INSURANCE.

## VIII. TIME GIVEN FOR PAYMENT—See PRINCIPAL AND SURETY.

## IX. TO SAVE STATUTE OF LIMITATIONS—See LIMITATION OF ACTIONS.

## I. APPROPRIATION OF PAYMENTS.

By a decree of the Court of Chancery it was directed that an account should be taken of all dealings between St. J., the plaintiff, and R., the defendant. The master found that \$453.20 was due to the defendant by the plaintiff. The master disallowed to the plaintiff the amount of a note for \$510, and interest thereon as barred by the Statute of Limitations; and reduced the interest on a sum of \$3,000 advanced from twenty-four per cent. to six per cent. after judgment had been recovered. The note of \$510 was dated 18th November, 1861, and was payable with interest at the rate of \$10 per week from the 23rd November, 1861. On the 6th March, 1867, the defendant, who had been sued by the plaintiff for certain other claims, entered into agreement with him in order to relieve him from the pressure of execution debts, paid him \$2,000 on account of his indebtedness, and got time for the balance. The plaintiff made no demand at the time to be paid this note, and did not instruct his attorney who acted for him to seek payment of it until 1870:—Held, that the evidence showed an appropriation by respondent of the \$2,000 on account of the debts for which he was being pressed, and as the note for \$510 was not included in such debts, the master was right in treating it as barred by the Statute of Limitations. *St. John v. Rykert*, 10 S. C. R. 278.

See also *Bailey v. Jellett et al.*, 9 A. R. 187; *Taylor v. Mayrath*, 10 O. R. 669; *Spurr et al. v. Albert, Mining Co.*, 9 S. C. R. 35.

## II. RECOVERING BACK MONEY PAID.

1. *Under Protest.*

*Green v. Duckett*, 11 Q. B. D. 275, followed, as to the right to recover moneys paid under protest. *McKay et al. v. Howard*, 6 O. R. 135.—Boyd.

2. *In Error or Mistake of Fact.*

On the 31st May, 1873, under the authority of 37 Vict. c. 51, s. 192, (P.Q.) the City Council of the city of Montreal by a resolution adopted a report from their road committee prepared on the 30th April previous, as amended by a report of their finance committee of 27th May, 1879, recommending the construction of permanent sidewalks in the following streets (inter alia) Dorchester and St. Catharine. On the adoption of these reports with which an estimate indicating the quantity of flag stone required for each street, and the approximate cost of the work to be made in each street had been submitted, the city surveyor caused the sidewalks in the said streets to be made, and assessed the cost of these sidewalks according to the front of the real estate owned by the proprietors on each side of the same, and prepared a statement of the same, which he deposited with the treasurer for collection. D. A. B. possessed real estate on Dorchester and St. Catharine streets, and did not object to the construction of the new sidewalk. On the 3rd December, 1877, a few days after receiving notice from the city treasurer to pay within fifteen days certain sums, in default whereof execution would issue, D. A. B. paid, without protest, \$946.25; and on the 29th October, 1878, paid a further sum of \$438.90, and on the 14th November, 1878, without having received any notice, paid \$700 on account of 1877 assessment. In an action by D. A. B. against the city of Montreal, to recover the said sum of money which she alleged to have paid in error, believing the assessment valid:—Held, affirming the judgment of the court below, 2 Dorion's Q. B. R. 221, (Henry and Gwynne, J.J., dissenting), that D. A. B. had failed both in allegation and proof, to make out a case for the recovery of the assessment paid by her, either as a voluntary payment made in ignorance of its illegality, or as a constrained payment of an illegal tax, and that mere irregularities in the mode of proceeding to the assessment, although they might in a proper proceeding, have entitled the ratepayers to have had the assessment quashed, did not now entitle her to recover the amount back as a payment of a void assessment illegally extorted. 2. That the City Council in laying pavements in parts of the city only, the cost of which was to be paid by assessment according to the frontage of the respective properties, and not in proportion to the cost of the part laid opposite each property, were acting within the scope of the power conferred upon them by 37 Vict. c. 51, s. 192. 3. That the objection founded on the invalidity of the assessment for want of notice, not having been alleged nor relied on at the trial of the case, was irrelevant on this appeal. *Bain v. City of Montreal*, 8 S. C. R. 252.

The plaintiffs ordered goods from the defendant in Montreal to be shipped to them in Toronto, and three several consignments were made, one of which having been addressed to "J. H. C. & Co.," instead of "H. E. C. & Co.," never reached the plaintiffs, but was, after remaining eighteen months in possession of the carriers, in due course sold for payment of the charges thereon. The plaintiffs in ignorance of the non-receipt of the third consignment accepted and paid the defendant's draft for the amount of the invoices of the three consignments. Subsequently they discovered their error and demanded a return of the

amount paid. Held, that the plaintiffs were not entitled to a return of the money paid, as the defendant was not liable for the mistake. *McKay et al. v. Howard*, 6 O. R. 135.—Boyd.

## V. F.

Payment of for corporation principal. *Duckett and*

A testator's wife and the money left by will, and for life and the execution of a then a minor defendant money might be administered, and are entitled to, or to the administrator, or to the company under and rule 5 in ordinary moneys in voluntary made in the O. J. Act, administrator the order. estate sub when paid mixed with appeal by made an order be paid on the estate's Bank Life Assurance

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tors were ordered to pay the amount of the bequest into court. *Re Andrews*, 11 P. R. 199, distinguished. *Re Parr*, 11 P. R. 301.—Boyd.

Where the plaintiff's solicitor made default in payment into court of the ten per cent. paid to him at the time of sale, under the conditions of sale:—Held, that the other parties entitled to the purchase money should not suffer thereby, but that the plaintiff's share should be charged with the deficiency. *Mulkins v. Clarke*, 11 P. R. 350.—Proudfoot.

#### VI. PAYMENT OF MONEY OUT OF COURT.

##### 1. In Actions.

See *Bell v. Fraser*, 12 A. R. 1, p. 522.

##### 2. When Paid in as Security for Appeal.

On the 16th November, 1881, an order was made directing D. to pay a certain sum of money into court. D. appealed from this order to the Court of Appeal, and for the purpose of staying execution, instead of giving security, as required by R. S. O. c. 38, s. 4, he paid this sum into court, being authorized so to do by an order in Chambers. On the 27th October, 1883, the Court of Appeal reversed the order of 16th November, 1881. The respondents then gave notice of appeal to the Supreme Court of Canada:—Held, that the money paid in by D. must be taken to have been so paid in lieu of the bond required by the statute; that when the decision in appeal was given in D.'s favour, the money had served the purpose for which it was paid: and that it ought to be repaid. *Re Donovan—Wilson v. Beatty*, 10 P. R. 71.—Proudfoot.

The defendants being entitled by the judgment of the Court of Appeal to the costs of the action, obtained out of court for suit the bond given by the plaintiff for security for such costs. Before action on the bond, and pending an appeal by the plaintiff from the judgment of the Court of Appeal to the Supreme Court of Canada, one of the sureties on the bond obtained leave and paid into court to the credit of this action, \$400, the amount due on the bond, to abide further order. Upon the application of the defendants, the company, *Boyd, C.*, directed \$200 of the \$400 to be paid out to their solicitors, upon the solicitors undertaking to refund the amount if the Supreme Court should vary the disposition of costs made by the Court of Appeal. *Kelly v. Imperial Loan Co. et al.*, 10 P. R. 499.

The defendants succeeded at the trial, in the Divisional Court, and in the Court of Appeal. Pending an appeal by the plaintiffs to the Supreme Court of Canada, the defendants applied for payment out of Court to them of a sum paid in by the plaintiffs representing the whole subject matter of the litigation:—Held, that the application was in the discretion of the court: that that discretion should be exercised in the same way as upon an appeal to the Court of Appeal; and that the application should therefore be refused, following *King v. Duncan*, 9 P. R. 61. *Canadian Land and Emigration Co. v. Township of Dysart et al.*, 11 P. R. 51.—Ferguson.

#### 3. Other Cases.

Money in court to the credit of a lunatic, though not so found, was directed to be paid out in annual sums for maintenance. *Re Hinds, Hinds v. Hinds*, 11 P. R. 5.—Ferguson.

Lien of solicitor on fund in court. See *Re Ryan*, 11 P. R. 127; *Yeman v. Johnston*, 11 P. R. 231.

A sum of money left by McD. in his will to his daughter, who predeceased him was paid into court by McD.'s executors. The daughter by her will had disposed of the moneys which she expected from her father's estate, leaving part to her husband and part to her infant children, naming her husband executor, and directing him to invest the infants' shares and expend the interest for their maintenance. It was admitted by the official guardian on behalf of the infants that there was no reason to anticipate danger to the money if paid out to the executor:—Held, that the will of the testatrix should be respected, and the infants' money paid out to the executor. *Re McDougall Trusts*, 11 P. R. 494.—Ferguson.

#### PEDIGREE.

See EVIDENCE.

#### PEDLAR.

See MUNICIPAL CORPORATIONS.

#### PENAL ACTIONS AND PENALTIES.

I. UNDER CONTROVERTED ELECTIONS ACT—See PARLIAMENTARY ELECTIONS.

II. UNDER MUNICIPAL ACT—See MUNICIPAL CORPORATIONS.

III. CONVICTIONS FOR PENALTIES—See JUSTICES OF THE PEACE—INTOXICATING LIQUORS.

Held, that the 18 Eliz. c. 5, which enacts that an informer shall sue either in person or by attorney, is in force in this province, and therefore the plaintiff, an infant, suing by his next friend could not maintain an action for a penalty under the Election Act. The appellant having omitted to take this objection in the court below this court on allowing the appeal on that ground, refused him his costs of appeal. A person who sues for a penalty given by the Election Act is a common informer. *Garrett v. Roberts*, 10 A. R. 650.

Security for costs in penal action. See *Budworth v. Bell*, 10 P. R. 544, p. 133.

#### PENALTY BY CONTRACT.

To an action for the balance due under a building contract, the defendant set up as a defence that by the contract the plaintiff was to build the house and have the same completely finished

credit of a lunatic, acted to be paid out. *Re Hinds*, —Ferguson.

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The daughter by moneys which she state, leaving part of her infant children, and directing him and expend the in. It was admitted by of the infants that pate danger to the tator:—Held, that l be respected, and o the executor. *Re* 94.—Ferguson.

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and ready for the defendant's occupation by a named date, "under a penalty of \$5 per day," to be paid by the plaintiff to the defendant for each and every day the work on the said house remained unfinished after the said date; alleging that the work remained unfinished after the said date for a certain number of days, making an amount which the defendant claimed to deduct from the contract price:—Held, on demurrer, defence good: that the \$5, though called a penalty, was in fact liquidated damages:—Quære, whether a demurrer was the proper mode of raising the question as some damages would be recoverable. *Chatterton v. Crothers*, 9 O. R. 683.—Rose.

On May 27th, 1885, certain individuals forming a Cigar Manufacturers' Association, amongst whom was the defendant, considering themselves aggrieved by the members of the Cigar Makers' union, who refused to lower the price of making a particular kind of cigar, entered into an agreement in writing between themselves of the first part and S. of the second part, as follows: "Whereas for the mutual advantage and protection of the parties hereto \* \* it has been agreed that the parties of the first part shall become severally bound to S. in the sum of \$500, liquidated damages in case any of them shall at any time during the continuance of this agreement, either directly or indirectly, buy or sell any cigars marked \* \* with the labels of the Cigar Makers' union, or shall use the \* \* in connection with the manufacture of cigars by him any Cigar Makers' union label, \* \* or shall permit \* \* any Cigar Makers' union, or any union or set of men to compel him to hire or employ union men only, or to dismiss any employee. Now, therefore, \* \* the parties hereto of the first part severally covenant with S. each for himself that he will, in case he shall at any time hereafter violate any of the foregoing stipulations (setting them out immediately pay to S. the sum of \$500: the intention being that in case of a violation of all or any of the stipulations \* \* aforesaid by any of the parties hereto of the first part, he, the said party so offending, shall immediately forfeit and pay to S. the full sum of \$500, \* \* because of his so offending, as liquidated and ascertained damages (and not as a penalty) to be by S. applied, &c. \* \* The intention, also, being that the entire sum of \$500 shall be the amount of the ascertained and liquidated damages of any violation or breach whatever, of any of the stipulations \* \* aforesaid on the part of any one of the parties of the first part." The defendant having broken the above agreement in all respects, S. brought this action against him to recover \$500 as liquidated damages:—Held, that the sum of \$500 was liquidated damages and not a penalty. *Schrader v. Lillis*, 10 O. R. 358.—Proudfoot.

Where a contract contains a condition for payment of a sum of money as liquidated damages for the breach of stipulations of varied importance, none of which is for payment of an ascertained sum of money, the general rule is, that the sum named is not to be treated as a penalty, but as liquidated damages. Moreover, in this case, the stipulations resolved themselves into one—viz., that the defendant would not omit to omit the dictation of the cigar makers in carrying on his

business. It was impossible to calculate the damage to the other members of the manufacturers' association by non-compliance with the agreement. The case would therefore seem to come within the rule that when the agreement is for the performance of one act, and there is no adequate means of ascertaining the damages from a violation and the parties agree upon a sum as liquidated damages, it will not be treated as a penalty. *Ib.*

See *Corporation of the Village of Brussels v. Ronald*, 11 A. R. 605, p. 456.

## PERJURY.

Action on judgment. Defence that the judgment was obtained by perjury, stating the perjury:—Held, good. *Stewart v. Sutton et al.*, 8 O. R. 341.—Rose.

## PETITION OF RIGHT.

McL., the suppliant, purchased, in 1880, a first-class railway passenger ticket to travel from Charlottetown to Souris on the Prince Edward Island railway, owned by the Dominion of Canada, and operated under the management of the Minister of Railways and Canals, and while on said journey sustained serious injuries, the result of an accident to the train. By petition of right the suppliant alleged that the railway was negligently and unskilfully conducted, managed and maintained by Her Majesty; that Her Majesty, disregarding her duty in that behalf and her promise, did not carry safely and securely suppliant on said railway and that he was greatly and permanently injured in body and health, and claimed \$50,000. The Attorney General pleaded that Her Majesty was not bound to carry safely and securely, and was not answerable by petition of right for the negligence of her servants. The learned judge at the trial found that the road was in a most unsafe state from the rottenness of the ties, and that the safety of life had been recklessly jeopardized by running trains over it with passengers, and that there had been a breach of a contract to carry the suppliant safely and securely, and awarded \$36,000. On appeal to the Supreme Court of Canada:—Held (Fournier and Henry, J.J., dissenting), that the establishment of Government railways in Canada, of which the Minister of Railways and Canals has the management, direction and control, under statutory provisions, for the benefit and advantage of the public, is a branch of the public police created by statute for purposes of public convenience, and not entered upon or to be treated as a private and mercantile speculation, and that a petition of right does not lie against the Crown for injuries resulting from the nonfeasance or misfeasance, wrongs, negligences, or omissions of duty of the subordinate officers or agents employed in the public service on said railways. That the Crown is not liable as a common carrier for the safety and security of passengers using said railways. *The Queen v. McLeod*, 8 S. C. R. 1.

H., in his capacity of "clerk of the joint committee of both houses on printing," advertised

for tenders for the printing, furnishing the printing paper, and the binding required for the parliament of the Dominion of Canada. The tender of the suppliants was accepted by the joint committee and by both houses of parliament by adoption of the committee's report, and a contract was executed between the suppliants and H. in his said capacity. The suppliants, by their petition, contended that the tender and acceptance constituted a contract between them and Her Majesty, and that they were entitled to do the whole of the printing required for the parliament of Canada, but had not been given the same, and they claimed compensation by way of damages:—Held, reversing the judgment of Henry, J., in the Exchequer Court, that the parliamentary printing was a matter connected with the internal economy of the senate and house of commons over which the executive government had no control; and that the Crown was no party to the contract with the suppliants and could not be held responsible for a breach of it. *Regina v. MacLean*, 8 S. C. R. 210.

Prior to confederation one T. was cutting timber on territory in dispute between the old Province of Canada and the Province of New Brunswick, the former having granted him a license for the purpose. In order to utilize the timber so cut, he had to send it down the St. John River, and it was seized by the authorities of New Brunswick and only released upon payment of fines. T. continued the business for two or three years, paying fines to the Province of New Brunswick each year, until he was finally compelled to abandon it. The two Provinces subsequently entered into negotiations in regard to the territory in dispute, which resulted in the establishment of a boundary line, and a commission was appointed to determine the state of accounts between them in respect to such territory. One member of the commission only reported finding New Brunswick to be indebted to Canada in the sum of \$20,000 and upwards, and in 1871 these figures were verified by the Dominion Auditor. Both before and after Confederation T. frequently urged the collection of this amount from New Brunswick with the object of having it applied to indemnify the parties who had suffered by the said dispute while engaged in cutting timber, and finally by an Order in Council of the Dominion Government (to whom it was claimed the indebtedness of New Brunswick was transferred by the B. N. A. Act), it was declared that a certain amount was due to T., which would be paid on his obtaining the consent of the Governments of Ontario and Quebec therefor. Such consent was obtained and payments on account were made by the Dominion Government first to T. and afterwards to the suppliant, to whom T. had assigned the claim. Finally the suppliant not being able to obtain payment of the balance due by said Order in Council, proceeded to recover it by petition of right, to which petition the defendant demurred on the ground that the claim was not founded upon a contract and was not properly a subject for petition of right. Fournier, J., sitting in the Court of Exchequer, overruled the demurrer and gave judgment for the suppliant. On appeal to the Supreme Court of Canada:—Held, reversing the judgment of Fournier, J. (Fournier and Henry, JJ., dissenting), that there being no previous indebtedness shewn to T. either from

the Province of New Brunswick, the Province of Canada, or the Dominion Government, the Order in Council did not create any debt between T. and the Dominion Government which could be enforced by petition of right. *The Queen v. Dunn*, 11 S. C. R. 385.

It is settled law that a petition of right will lie for damages resulting from a breach of contract by the Crown. *Thomas v. The Queen*, 1 R. 10 Q. B. 31, and *Feather v. The Queen*, 6 R. & S. 293, approved. It is immaterial whether the breach is occasioned by the acts or by the omissions of the crown officials. Judgment of Supreme Court of Canada, 10 S. C. R. 335, affirmed. *Windsor and Annapolis Railway Co. v. The Queen et al.*, 11 App. Cas. 607.

See *Regina v. Doutre*, 9 App. Cas. 745 p. 141; *Regina v. Smith*, 10 S. C. R. 1, p. 99.

### PETTY CHAPMEN.

See MUNICIPAL CORPORATIONS.

### PLANS.

- I. IN EVIDENCE—See EVIDENCE.
- II. SALE OF LAND ACCORDING TO PLANS—See SALE OF LAND.
- III. REGISTRATION OF—See REGISTRY LAWS.

Quære, whether a person who has laid out land into town or village lots for sale cannot afterwards, if he finds that he cannot dispose of them as such, or for any other reason, replace his land as it was before. *In re Allan*, 10 O. R. 110.—Wilson.

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- XIV. IN LIBEL AND SLANDER—See DEFAMATION.
- XV. IN ACTIONS AGAINST EXECUTORS AND ADMINISTRATORS—See EXECUTORS AND ADMINISTRATORS.

#### I. GENERALLY.

In this case which was an action for the rescission of a contract for the sale of land:—Held, that inasmuch as all the evidence that could throw light upon the case had admittedly been given the fact that the issue of improvidence was not raised on the pleadings was immaterial. In such a case it is a mere matter of form to adapt the pleadings to the matters proved. *Gough v. Bench*, 6 O. R. 699—Chy. D.

Per Strong and Gwynne, J.J.: It is doubtful whether the strict rules applied in England to equitable defences pleaded under the C. L. Procedure Act should be adopted with reference to such pleas in Nova Scotia, where both legal and equitable remedies are administered by the same court and in the same forms of procedure. *Smith v. Bank of Nova Scotia*, 8 S. C. R. 558.

When a pleading contains an answer to allegations in the opposite pleading, which is insensible if not read as admitting certain statements, those statements must be taken as admitted. *Richardson v. Jenkin*, 10 P. R. 292—C. P. D.

In action of replevin. See *Robins v. Coffee*, 9 O. R. 332.

#### II. VENUE OR PLACE OF TRIAL.

##### 1. Generally.

Held, that the effect of Rule 254 of the O. J. Act is to abolish all local venues as well those made so by statute as at the common law, except actions of ejectment. *Legacy v. Pitcher et al.*, 10 O. R. 620—Q. B. D. See also, *Ireland v. Pitcher*, *Id.* 631.

Where cross-actions, with different venues, are consolidated, the place of trial will be ordered as the balance of convenience requires. *Gonee v. Leitch*, 11 P. R. 255.—Dalton, *Master*.

An action by a mortgagee for foreclosure, payment, and possession of the mortgaged premises is not an action of ejectment within the meaning of the exception in Rule 254, O. J. Act, and the venue need not therefore in such an action be laid in the county where the lands lie. *Seymour v. DeMarsh*, 11 P. R. 472.—Dalton, *Master*.

##### 2. Changing.

As to the power of the master in chambers to change the venue in County Court actions. See *Brigham v. McKenzie*, 10 P. R. 406.

The plaintiff lived and carried on business in Toronto, the defendants in Parkhill, near London. The action was brought upon a contract to purchase certain goods obtained by an agent of the plaintiff, who solicited the order in Parkhill, where the contract was signed. The goods were to be delivered by the plaintiff to the Grand Trunk Railway Company in Toronto. The defence set up fraud in obtaining the contract. The plaintiff proposed to have the action tried at Toronto. The defendants swore that they intended to call six witnesses: that the cause of action arose in Parkhill; and that the expense of a trial at Toronto would be greater by \$30 than at London. The plaintiff swore that he intended to call six witnesses and give evidence himself: that four of the six lived in Toronto, one east of Toronto and one in Parkhill; and that the extra expenses of a trial at London would be about \$25:—Held, that the cause of action arose in Toronto, and that there was no such preponderance of convenience in favour of London as would justify a change in the place of trial following *Noad v. Noad*, 6 P. R. 48; *Davis v. Murray*, 9 P. R. 222, and *Robertson v. Daganeau*, 19 C. L. J. 19. Appeal allowed, and place of trial restored to Toronto. *Walton v. Wideman et al.*, 10 P. R. 228.—Rose.

A motion to change the place of trial in a county court action from London to Toronto was refused under the following circumstances: The action was on a promissory note made and payable at Toronto. The plaintiff resided in Montreal, and his solicitor in London. The sole defence was, that the defendant was discharged from liability under the Insolvent Act. The defendant resided in Toronto, and swore that he intended to call two witnesses, the clerk of the county court at Toronto, and the assignee of the defendant who also lived there. The plaintiff filed no affidavit on the motion. *State v. Purnis*, 10 P. R. 604.—Rose.

The plaintiff having in his statement of claim named Toronto as the place of trial, afterwards amended it on process under Rule 179, O. J. Act, naming Belleville as the place of trial:—Held, on appeal, affirming the decision of the Master in Chambers, and following *Frietsch v. Winkler*, 3 Chy. Chamb. 109 (decided under Chy. G. O. 81, which is substantially the same as Rule 179), that no change of the place of trial could be made by amendment of the statement of claim. *Bull v. North British Canadian Investment Company (Limited) et al.*, 10 P. R. 622.—Rose.

The action came on for trial at the Toronto Assizes, but the trial was postponed, and Armour, J., endorsed on the record: "Upon my own motion I order that the place of trial in this cause be changed to the town of Belleville, and that this cause be tried at the next assizes there by a jury." Rose, J., sitting in chambers, had previously refused to change the place of trial to Belleville:—Held, that the question of place of trial was res judicata:—Held, also, notwithstanding sec. 28, sub-ss. 2 and 3 O. J. Act, that the Divisional Court had jurisdiction to hear an appeal from the order of Armour, J., having regard to the language of Rule 254, O. J. Act,

and of the order itself. *Bull v. North British Canadian Loan and Investment Co. (Limited), et al.*, 11 P. R. 83.—C. P. D.

Semble, Rule 254 does not give a judge a right to interfere with the procedure in the action except at the instance of a party. *Id.*

Mr. Winchester, official referee, sitting for the master-in-chambers, refused an application by the defendant to change the place of trial from Sarnia to Stratford, but gave leave to bring on an appeal from his order, or a substantive motion to change the place of trial before Armour, J., at the Sarnia Assizes. Armour, J., entertained the motion, which was made according to the leave given, and made the order changing the venue to Stratford. The order was drawn up as made by a judge at the Assizes, and was signed by the local registrar at Sarnia:—Held, that, having regard to Rule 254, O. J. Act, and to the leave given and the character of the motion, the order of Armour, J., was to be regarded as that of a judge and not of the High Court, and could therefore be reviewed by the Divisional Court. *The Sarnia Agricultural Implement Manufacturing Co. v. Perlue*, 11 P. R. 224.—C. P. D.

There is nothing to prevent a judge sitting at the Assizes hearing a chamber motion, if he is disposed for the purpose to treat the court room as his chambers. Such an application as this, however, should not be made at the trial on account of the inconvenience and detriment to the public interest arising from the delay of other business appropriate to the Assizes, and on account of the injustice to parties to the cause who have prepared for trial; and it is too late when the Assizes have begun to consider the question of the balance of convenience; and therefore, while the court did not see fit under the circumstances to restore the venue to Sarnia, they varied the order of Armour, J., by making the costs of the day at Sarnia, and of the several motions to change the venue costs to the plaintiff in any event. *Id.*

In an action by a husband against his wife to enforce a charge on land, the cause of action arose at Hamilton, where also the parties and their respective solicitors and all the witnesses resided, but the plaintiff proposed to have the action tried at Toronto. The increase in expense of a trial at Toronto over one at Hamilton was estimated by the defendant at between \$50 and \$75, and by the plaintiff at about \$30:—Held, that there was an exceeding preponderance of convenience in favour of Hamilton, and it was ordered that the place of trial should be changed, unless the plaintiff at once paid into court \$40 to meet the defendant's additional expense. *Servos v. Servos*, 11 P. R. 135.—Boyd.

In an action of ejectment the place of trial may be changed by order of a judge. If the power to change is not given by Rule 254, O. J. Act, it is not taken away thereby, and it previously existed under R. S. O., c. 51, s. 23. *Canadian Pacific R. W. Co. v. Manion*, 11 P. R. 247.—Proudfoot—Chy. D.

### III. PARTIES.

#### 1. *Cestui que Trust.*

The plaintiff was the surviving trustee under the will of one J. B., of certain land, on which

was erected a two storey brick house, the westerly wall of which formed the boundary of one L.'s land, immediately adjoining the plaintiff's on the west, leased to F., who erected thereon a large brick building, using the plaintiff's westerly wall as a party wall, inserting joists therein, and building thereon so as to raise it two stories higher, thereby weakening the plaintiff's wall. F. mortgaged to a building society, who, on default, sold to the defendant:—Held, that the plaintiff under the O. J. Act, Rule 95, was entitled to maintain an action as representing the estate, without making the *cestui qui trust* parties. *Brooke v. McLean*, 5 O. R. 209.—C. P. D.

#### 2. *Executors.*

Held, in this case, that it was not necessary or right that the executors of A. F. sen. should be parties to the action, which was brought for the rectification of the deeds to J. S. and the subsequent deeds depending thereon. *Ferguson v. Winsor*, 10 O. R. 13.—O'Connor.

See *Burn v. Burn*, 8 O. R. 237, p. 533.

#### 3. *Husband and Wife.*

Under the practice in Nova Scotia, when the wife is improperly joined as co-plaintiff with the husband the suit does not abate, but the wife's name must be struck out of the record and the case determined as if brought by the husband alone. *Caldwell et al. v. The Stadacona Fire and Life Ins. Co.*, 11 S. C. R. 212.

#### 4. *Mortgagees.*

The land in respect of which the claim was made in this action was mortgaged:—Held, that the mortgagee was not a necessary party, the proceeding not being for compensation for land taken, but as a defence of and protection to property. As, however, his security might be prejudiced or diminished by the washing away of the land, and he might be able to assert some right to the compensation, there could be no objection to his being joined; but as the compensation was only some \$50, the court would not require him to be made a party. *In re Nickle and the Corporation of the Town of Walkerton*, 11 O. R. 433.—Wilson.

It was contended in this case on the part of the defendants that the mortgagees of the property should be made parties:—Held, that O. J. Act, s. 17, sub-s. 5, enables a mortgagor, entitled to the possession of land, as to which the mortgagee has given no notice of his intention to take possession, to sue to prevent or recover damages in respect of any trespass or other wrong relative thereto in his own name only, and that the objection for want of parties ought not to prevail. *Platt v. The Grand Trunk Railway Co. of Canada*, 12 O. R. 119.—Proudfoot.

In an action to enforce a mechanic's lien under R. S. O. c. 120, a reference in the usual form was directed to the local master at Chatham, to inquire whether any person besides the plaintiffs, other than prior mortgagees, had any incumbrance, &c., upon the premises in question. In proceeding under this reference, the master made

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house, the western boundary of one of the plaintiff's lots erected thereon the plaintiff's westing joists thereon to raise it two feet above the plaintiff's building society, who, defendant:—Held, that Act, Rule 95, was not representing the true trust parties. *R. 209—C. P. D.*

is not necessary or F. sen. should be brought for the S. and the sub. *Ferguson v. R. 37, p. 533.*

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which the claim was alleged:—Held, that the plaintiff party, the compensation for land protection to property might be prevented by washing away of the plaintiff's property could be no objection as the compensation would not. *In re Nickle and Walkerton, 11 O.*

on the part of the plaintiff's property that O. J. Act, s. 10, entitled to the mortgagee has to take possession damages in respect of wrong relative and that the objection would not prevail. *Way Co. of Can-*

manic's lien under the usual form at Chatham, to the plaintiff's, had any incumbrance in question. In the master made

a number of persons, including the appellants, parties in his office, and caused them to be served with notice "T," which erroneously recited the judgment as directing an inquiry as to incumbrances generally. The appellants thereupon petitioned to discharge the master's order upon the ground that they were prior mortgagees, and hence not necessary or proper parties to the action. It appeared that the appellants registered their mortgage before any of the work was done or materials supplied for which the plaintiffs claimed, and had advanced the full amount of the mortgage money some months before the plaintiff's lien was registered, though a portion was advanced after they had commenced work or supplied materials. The mortgagees had no notice of the plaintiff's lien:—Held, reversing the judgment of the court below, that the appellants' claim was prior to that of the plaintiffs, and that they were not proper parties to the action, being excepted by the terms of the judgment, nor was the master warranted in entering upon any inquiry as to the amount advanced by them subsequent to the commencement of the work. *Richards v. Chamberlain, 25 Chy. 402, and Hynes v. Smith, 27 Chy. 150, referred to. McFean v. Tiffin, 13 A. R. 1.*

See *Polson et al. v. Degeer et al., 12 O. R. 275, p. 612; Macdonald et al. v. McCall et al., 12 A. R. 593, p. 294.*

### 5. Partners.

Held, that the suit in this case, which was brought against the executor and surviving partner of D. B. was maintainable as brought, for though the general rule is, that persons who have possessed themselves of the property of the deceased, or are debtors to the estate generally, cannot be made parties to a suit against the executor, yet this rule is relaxed in the case of surviving partners of the deceased, whom it is allowed to make parties with the executor in order that the plaintiff may have an account of the personal estate entire. At all events, such an action may be supported in all cases where the relationship between the executors and the surviving partners is such as to present a substantial impediment in the prosecution by the executors of the rights of the parties interested in the estate against the surviving partners, as seemed the case here, although it did not appear that there had been actual collusion between L. and W. B. *D. Burn v. Burn, 8 O. R. 237.—Ferguson.*

The cause of action arose before, and the writ of summons was issued after, the dissolution of the defendants' firm:—Held, that the defendants were properly sued in their firm name. *Wilson v. Roger McLay & Co., 10 P. R. 355.—Dalton, Master—Osler.*

### 6. Adding Parties.

#### (a) Generally.

The action was upon promissory notes made by the defendants to the order of the B. C. L. Co., and by them endorsed to the plaintiff Co. The defendants claimed indemnity against the B. C. L. Co., and at the trial that company, against the protest of the plaintiffs, was made a third party defendant, and judgment was directed to be entered against them in favour of the defend-

ants to indemnify the defendants against the judgment rendered against them at the suit of the plaintiffs:—Held, reversing the order making the company a third party, and the judgment against them, that third parties should be joined only before trial: that in any case they can be joined only for the purpose of binding them by the judgment against the original defendant; and that in order that the original defendant may obtain indemnity against a third party he must bring a separate action. *Lockie et al. v. Tennant et al., 5 O. R. 52—Q. B. D.*

The plaintiffs took a chattel mortgage from W., who the next day assigned to the defendant in trust for the benefit of his creditors. The defendant was not a creditor, and before any creditor had been informed of the assignment the plaintiffs, who had omitted to register their mortgage, demanded of the defendant the goods contained in it, which was refused, whereupon this action was brought. Upon the application of the defendant, with the consent of M., a creditor of W., the Master in Chambers ordered M. to be added as a party defendant, in order to test the validity of the plaintiff's mortgage:—Held, affirming the order of Galt J., who rescinded the master's order, that the defendant was not entitled to the order, for when the plaintiff demanded the goods the creditors had no right, and they could not by a subsequent assent make good their claim under the assignment. *Hyman v. Bourne, 5 O. R. 430—Q. B. D.*

Where the plaintiffs brought action against the defendants to recover possession of certain lands, and the latter resisted the claim, and also served a third party notice upon H., claiming indemnity; and, thereupon, by order in chambers, on the application of the defendants, H. was made a party defendant to the action, and the plaintiffs afterwards abandoned their claim to the lands:—Held, that the plaintiffs must pay H.'s costs. *Beard et al. v. Credit Valley R. W. Co., 9 O. R. 616.—Ferguson.*

A cheque had been drawn upon the plaintiffs, payable to the Hamilton Tool Company, and upon an endorsement, purporting to be that of the Tool Company, the defendants cashed the cheque, and upon presentation by them to the plaintiffs, were repaid the amount:—The Tool Company repudiated the endorsement. The defendant's solicitor swore that he had good reason to believe, and did believe, that a third party was the beneficial plaintiff, and that there were equities which would attach as against the present plaintiffs. Leave to add such third party was refused, but leave was given to the defendants to amend by alleging that the third party was the beneficial plaintiff, and to set up any defence that might be open to them on that ground. *Bank of Commerce v. Bank of British North America, 10 P. R. 158.—Dalton, Master.*

An objection was taken in the Divisional Court, that the action should have been brought by the consignee James, because, as was alleged, the evidence shewed that the property had passed to him. The objection was not taken at the trial or in the pleadings, otherwise it would have been shewn that the property was still in the plaintiff; and in any event the consignee James consented to be added as a co-plaintiff:—Held, that the objection could not now be raised; and, even if

there were anything in it, the court would allow James to be added as a co-plaintiff. *Dymont v. The Northern and North-Western R. W. Co.*, 11 O. R. 343.—C. P. D.

Adding Attorney-General. See *Re Trent Valley Canal, Re "Water Street" and the Road to the Wharf*, 11 O. R. 687.

See *Torrance et al. v. Livingstone*, 10 P. R. 29, p. 538; *Hewitt v. Heise*, 11 P. R. 47, *infra*.

#### (b) Third Party.

In an action for the non-delivery of coal, one of the defendants gave notice to S. & M., under the first part of Rule 107 and Rule 108, of the action, and that he claimed contribution from them to the extent of one-half of any sum recovered against him on the ground that they were co-partners in the transaction, &c. S. & M. appeared to this notice, and the master in chambers subsequently made an order giving them leave to appear, and directing that they should be bound by any judgment against the said defendant:—Held, on appeal from the order of Osler, J. A., setting aside the order of the master, that the latter order had been properly made. *McLaren et al. v. Marks et al.*, 10 P. R. 451.—Q. B. D.

The plaintiff and P. both claimed to be entitled by assignment to a mortgage made by the defendant. The defendant paid P. one gale of interest and received indemnity for the amount paid against any claim on the part of the plaintiff. The plaintiff then brought this action claiming the interest which had been paid to P., and also the principal for default in payment of interest. The defendant applied to have P. added as a co-defendant:—Held, not a proper case for adding P. as a party under Rule 103 (a), but rather one in which a notice might be served upon P. by the defendant under Rule 108, O. J. Act. Quere, per the master in chambers, whether the defendant had not a remedy by interpleader. *Hewitt v. Heise*, 11 P. R. 47.—Dalton, Master.—Osler.

In an action for the price of goods sold, C., to whom the defendant had paid the price of the goods, believing him and not the plaintiff to have the title thereto, and J. C. F. and A. F., who were charged by C. with having fraudulently obtained possession of the goods and made a pretended sale of them to the plaintiff, were added as defendants under Rule 109, O. J. Act, with a direction that C. should, in his pleading, state his case against J. C. F. and A. F., and that they should be at liberty to reply. *Brown v. Cousineau*, 11 P. R. 363.—Dalton, Master.—Proudfoot.

See *Tomlinson et al. v. The Northern R. W. Co. of Canada et al.*, 11 P. R. 419, p. 543.

#### 7. Other Cases.

The plaintiff, the owner of a water-lot and boat house abutting on the Ottawa River, who carried on the business of letting boats for hire, brought an action against four saw-mill owners, alleging that they being each the owner of a saw-mill situated higher up on the river than the plaintiff's lot, had each been in the habit of throwing sawdust, slabs, &c., into the river, and that this waste matter floating down had lodged upon and in front of the plaintiff's water-lot, and

had there formed into a solid mass:—Held that the four saw-mill owners were properly joined as defendants in one action. *Ratte v. Booth et al.*, 10 P. R. 649.—Boyd—Chy. D.

Action by two ratepayers on behalf of themselves and all other ratepayers of A. against all the members of the Municipal Council of A., charging that the defendants, acting fraudulently and in collusion with the treasurer of A., continued him in office after it had come to their knowledge that he was a defaulter, and allowed him to receive further moneys, causing loss to the municipality:—Held, that the law attaches the liability of trustees to municipal councillors, and that it was sufficient to charge them as such without using the word "trustees;" that the action was one in the former exclusive jurisdiction of the Court of Chancery, and a jury notice was therefore improper:—Semble, the municipal corporation should have been made a party to the action, and the action should have been on behalf of all ratepayers, except the defendants. *Morrow et al. v. Connor et al.*, 11 P. R. 423.—Proudfoot.

Where a person suing on behalf of himself and others is disentitled to sue on his own behalf he cannot do so on behalf of the others interested. *Dillon v. Township of Raleigh*, 13 A. R. 53.

See *Galbraith v. Irving*, 8 O. R. 751, p. 647; *Mitchell v. The City of London Fire Ins. Co. (Limited)*, 12 O. R. 706, p. 341; *Beatty et al. v. Neelon et al.*, 12 A. R. 50, p. 106; *Sewell v. British Columbia Towing & Transportation Co.*, 9 S. C. R. 527, p. 642.

#### IV. STATEMENT OF CLAIM.

##### 1. Generally.

The plaintiff in his statement of claim claimed damages from the defendants for "unlawfully, negligently and wrongfully," depressing certain streets in a town and thereby making it inconvenient and almost impossible for persons to approach the plaintiff's store for business: also for, in like manner, blocking them up, and rendering them almost impassable in the neighbourhood of the plaintiff's store, and thereby "negligently, unlawfully, and wrongfully," preventing customers or others coming thereto, and almost entirely destroying the plaintiff's business. The statement further claimed that if the depressing and blocking up should be found to be lawful, a mandamus should be granted requiring the defendants to proceed to arbitrate to ascertain the compensation payable to the plaintiff: or that it be referred to the proper officer to ascertain and state such compensation. Held, on demurrer, that the statement of claim was sufficient; for it alleged that the work was negligently done, and this gave a cause of action, even though the work itself might be lawful. *Quillinan et al. v. The Canada Southern R. W. Co. et al.*, 6 O. R. 567.—Rose.

Extending time for delivering statement of claim. See *Neucombe v. McLishan*, 11 P. R. 461.

##### 2. Joinder of Causes of Action.

Claims on behalf of a wife for alimony and to set aside a conveyance of the husband's property

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on behalf of themselves of A. against all the Council of A., acting fraudulently as treasurer of A., and had come to their aid, and allowed the cause, causing loss to the law attaches, municipal councillors, charge them as such trustees; that the exclusive jurisdiction, and a jury notice, the municipal made a party to the have been on behalf of defendants. *Mor-* P. R. 423.—Proud.

on behalf of himself and on his own behalf he and others interested. *h.*, 13 A. R. 53.

O. R. 751, p. 647; *London Fire Ins. Co.* 11; *Beatty et al. v.* p. 106; *Sewell v. Transportation Co.*,

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of claim claimed as for "unlawfully, depressing certain making it income for persons to ap- business: also for, up, and rendering the neighbourhood of rebey "negligently," preventing cus- hereto, and almost iff's business. The at if the depressing and to be lawful, and requiring the de- ate to ascertain the iff: or that it be- to ascertain and held, on demurrer, as sufficient; for it- gently done, and en though the work *Man et al. v. The* et al., 6 O. R. 567.—

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#### of Action.

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as fraudulent should be joined in one action. *Snider v. Snider—Snider v. Orr*, 11 P. R. 140.—Boyd.

Where the writ of summons was indorsed with a claim for the recovery of land and for mesne profits, but the statement of claim asked specific performance of the contract by the defendant to buy the land from the plaintiff, and in the event of specific performance not being decreed, possession, &c., and no order had been obtained for leave to join another cause of action with a claim for the recovery of land, as required by Rule 116, O. J. Act, and a motion was made to set aside the writ of summons and statement of claim, or one of them:—Held, that the causes of action were improperly joined in the statement of claim without leave, but inasmuch as the two causes of action could not conveniently be prosecuted separately, leave was given to amend the writ by adding a claim for specific performance, or the statement of claim by striking out such claim, at the plaintiff's option. *Campbell v. James*, 11 P. R. 347.—Dalton, *Master*.

See *Goring v. Cameron*, 10 P. R. 496, p. 538.

#### V. STATEMENT OF DEFENCE.

Statement of claim claiming damages for an accident to the plaintiff by his stepping upon the covering or lid of a manhole in the sidewalk alleged to be defective, &c., through defendants' negligence. By the first paragraph of the statement of defence defendants denied the correctness of the statements contained in the statement of claim; and by the second paragraph set up that defendants had no notice or knowledge of the defect:—Held, on demurrer to the second paragraph, that the whole statement of defence must be read together; and that the second paragraph taken with the first constituted a good defence or was immaterial; that it could not embarrass the plaintiff, for if he proved actionable negligence he must prove either actual or presumptive notice. *Beasley v. The Corporation of the City of Hamilton*, 9 O. R. 112.—Rose.

A statement of defence, delivered after the proper time and on the same day on which the plaintiff set the action down, to be heard on motion for judgment, was—Held irregular, and the court ordered that it should be struck out, and judgment granted for the plaintiff as prayed by the statement of claim, unless the defendant paid the costs of setting down the action and of the motion for judgment within a limited time. *Snider v. Snider*, 11 P. R. 34.—Boyd.

See *Pursley v. Bennett et al.*, 11 P. R. 64, p. 418.

#### VII. SET-OFF AND COUNTER-CLAIM.

In an action by the plaintiffs as endorsees of a bill of exchange, the defendant (the acceptor) set up that the bill was part of the price of goods bought by them from H. & G., the drawers, and filed a counter-claim against the plaintiffs, H. & G., as defendants by counter-claim, claiming that the bill was transferred to the plaintiffs after maturity, with full notice and knowledge of the facts, and claiming \$10,000 damages from H. & G. for breach of contract in respect of the goods, and asking for the delivery up and cancellation

of the bill, and other bills in the same transaction. Upon the application of H. & G., the master in chambers struck out the counter-claim, and the names of H. & G. as defendants:—Sembly, that as against the plaintiffs, the defence should have been pleaded as a defence to the claim on the bill. *Torrance et al. v. Livingstone*, 10 P. R. 29.—Dalton, *Master*.

In an action of trespass for entering the warehouse of a deceased person (of whom the plaintiff was the administrator) after his death and taking and converting the goods therein, the defendant set off a debt due by deceased to him. An administration order had been made of which the defendant had notice before defence. The set off was held bad under 27 Vict. c. 28, s. 28, and also because of the administration order. *Monteith v. Walsh*, 10 P. R. 162.—Dalton, *Master*.

An action against the defendant on his bond as surety for H. & McT. for the amount due the plaintiff by H. & McT. on their banking account with the plaintiffs. Counter-claim by the defendant against the plaintiff and H. & McT., alleging that the defendant is liable only as such surety, and that the plaintiff ought to resort to H. & McT. to enforce payment from them, and that H. & McT. should be ordered to pay the amount, and indemnify the defendant. As the counter-claim was not rested upon any particular agreement, but was set up as arising from the position of the parties as creditors, principal debtor, and surety. It was held bad, and ordered to be struck out. *Federal Bank v. Harrison*, 10 P. R. 271.—Dalton, *Master*.—Rose.

The defendant C. counter-claimed for damages in respect of a trespass by the plaintiff upon the lands in question, whilst he C. was in possession, and for an assault, &c., whereby he was compelled to quit the premises:—Held, that the counter-claim was not joining another cause of action with an action for the recovery of land within the meaning of Rule 116 O. J. Act:—Held, also, that the counter-claim should not be disallowed or excluded under Rules 127 (b.) or 168, O. J. Act, on the ground of inconvenience, it not appearing that there would be any inconvenience, and:—Sembly, that the counter-claim was sufficiently connected with the cause of action to make it advisable that they should be tried together. *Goring v. Cameron*, 10 P. R. 496.—Dalton, *Master*.—Osler.

A defendant asking relief against his co-defendant will not be ordered to give security for costs on the ground of residence out of the jurisdiction:—Sembly, such relief should not be asked by way of counter-claim. *Walsley v. Griffith et al.*, 11 P. R. 139.—Dalton, *Master*.

In an action for damages for negligence, a counter-claim for libel was excluded, on the ground of the inconvenience which would arise in trying the two causes of action together, but leave to bring an independent action was given. *McLean v. Hamilton Street Railway Co.*, 11 P. R. 193.—O'Connor.

The Judicature Act has not changed the law so as to allow of a claim arising since the commencement of the action being pleaded as a set-off, although it may be made the subject of counter-claim. Therefore, where a defence of

money due to defendants by the plaintiffs, part of which accrued before and part after action brought, was pleaded as a set-off, the order of a local judge directing the defendants to amend by confining their plea of set-off to those debts which accrued before the commencement of the action, was affirmed. *Chamberlain et al. v. Chamberlain et al.*, 11 P. R. 501.—Ferguson.

Held, that a married woman, though married before May 4th, 1859, was not bound by a covenant of her husband, entered into by him for himself, his heirs and assigns, as lessor of certain lands, to pay at the expiration of the lease for a certain malthouse which the lessee was to have liberty to erect on the demised premises, though the reversion had been assigned to her husband and another as trustees for her in such a way that she had the entire beneficial interest, and though the covenant ran with the land:—Held, also, that a claim on behalf of the said trustees for rent in arrear and for damages for non-repair was not matter of set-off against damages recovered against the husband for breach of his covenant to purchase the malthouse, though he was one of the trustees, they not being matters arising in the same right. *Ambrose v. Fraser et al.*, 12 O. R. 459.—Ferguson.

See *Field v. Galloway*, 5 O. R. 502, p. 112.

#### VIII. SPECIALLY PLEADING A STATUTE.

The statement of claim alleged a partnership between the plaintiff and defendant, but did not aver whether the agreement was in writing or not. The defence set up a special agreement by which the defendant was to be remunerated by a share of the profits in lieu of wages or salary, but did not expressly refer to the R. S. O. c. 133. It was admitted that something was due to defendant, and a reference was ordered. The Master in Ordinary held, following the remarks of Proudfoot, J., in *Rogers v. Ullman*, 21 Chy. 139, that as the defendant had not pleaded R. S. O. c. 133, so as to negative the plaintiff's allegation of a partnership, he could not claim the benefit of that statute to support his account, but to enable him to properly raise the question on appeal, permitted an affidavit to be filed shewing that there was an agreement under the statute:—Held, on appeal, that the case did not come within the terms of Rule 141, O. J. Act, and that it was not necessary, more specifically to plead the statute. *Neil v. Park*, 10 P. R. 476.—Boyd.

The Statute of Frauds not having been pleaded nor any objection properly taken to the sufficiency of the delivery of the piano either at the trial or in the order nisi, the court without deciding that there had been a sufficient delivery held that the objection was not open to the defendant and refused to permit an amendment. *Greenizen v. Burns*, 13 A. R. 481.

See *Kerfer v. Roaf et al.*, 8 O. R. 69, p. 618; *McKay v. Cummings*, 6 O. R. 400, p. 418.

#### IX. JOINDER OF ISSUE.

The reply in this action contained two paragraphs, the first denying certain allegations in the fourth paragraph of the defence, and the

second joining issue upon the rest of the defence. Notice of trial was served with the reply. A motion to set aside the notice of trial was dismissed, because the affidavit filed in support of it did not state that no joinder was filed when the notice of trial was given:—*Semble*, the joinder of issue referred to in Rule 176 O. J. Act, is not a simple denial of a previous pleading. *Weller v. Proctor*, 10 P. R. 323.—Dalton, Master.

The plaintiff delivered a simple joinder of issue upon the statement of defence and counter-claim:—Held, that this closed the pleadings, and that notice of trial served with it was regular. *Hare v. Cawthrope*, 11 P. R. 353.—C. P. D.

See *Chatterton v. Crothers*, 9 O. R. 683, p. 525.

#### X. OTHER PLEADINGS.

The fact that a suit for the same matter is pending in Quebec, cannot be urged as a plea in bar to a suit for the same cause in this Province. *Hughes v. Rees*, 5 O. R. 654.—Ferguson.

The action was to recover money as compensation for land expropriated, and for other relief. Defendants pleaded a defence in denial, and also a tender of \$400 and interest, but did not pay the amount into court:—Held, that the defence of tender without payment into court was a good defence under the O. J. Act, and a motion to strike out the defence, or to compel payment into court, or for judgment for the amount, with leave to proceed for a further amount, was refused. *Demorest v. Midland Railway Company et al.*, 10 P. R. 640.—Dalton, Master.

D. brought an action to compel a railway company to arbitrate to ascertain the value of certain land taken for the purposes of the railway company, and after the service of the writ the company served a notice to arbitrate, and after arbitration an award was made by two of the arbitrators, but was subsequently set aside by the court as invalid. D. then proceeded with his action, and the railway company pleaded that the arbitrators had fixed a time for the making of the award, but did not make any within the time limited, and did not enlarge the time, and that therefore the sum of \$400 offered by the railway company before proceedings taken had become the amount of the compensation. The learned judge found on the evidence that no time had been fixed by the arbitrators for making the award:—Held, that as the parties by their pleadings had placed themselves upon an issue as to whether the arbitrators had fixed a time or not, and as that issue was found in favour of the plaintiff, the sum of \$400 offered had not become the compensation to be paid, and a reference back was ordered. *Demorest v. The Grand Junction R. W. Co. et al.*, 10 O. R. 515.—Ferguson.

Pleas of fraud to actions on former judgments. See *Stewart v. Sutton et al.*, 8 O. R. 341; *Harvey v. Harvey*, 9 A. R. 91.

Pleading foreign judgment. See *Hughes v. Rees*, 10 P. R. 301; 9 O. R. 198.

#### XI. DEMURRER.

Per Gwynne, J., held, that as the plea demurred to in this case confessed the debt for which



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the action was brought, and that such debt was incurred under circumstances of fraud, and offered no matter whatever of avoidance or in bar of the action it was bad. *Shields v. Peak et al., 8 S. C. R. 579.*

A defendant did not, within ten days after delivery of a demurrer to a paragraph of the statement of defence enter it for argument and give notice, nor serve an order for leave to amend, as required by Rule 195 (a) O. J. Act:—Held, on an ex parte motion by the plaintiff for judgment upon his demurrer, that the proper practice in such a case is to apply to a judge in court, upon notice to the opposite party, for an order to strike out the pleading or part of the pleading demurred to, and for a direction as to payment of costs; but on the return of the motion the party in default will have no right to be heard as to the validity of the pleading. *Livingston v. Troun,* 10 P. R. 493.—Rose.

A demurrer to a statement of claim raised the question whether in an action against a shareholder living in Ontario, in a Quebec Joint Stock Company incorporated under the Dominion Joint Stock Companies' Act, 1877, it is sufficient to show a judgment and execution thereon returned unsatisfied in Quebec, or whether this must be shown in Ontario:—Held, that the demurrer was not frivolous. *Brice v. Munro,* 10 P. R. 548.—Dalton, *Master*—Rose.

Sembles, the jurisdiction as to setting aside demurrers as frivolous, should rarely be exercised where the point is a new one, and is apparently raised in good faith to obtain the opinion of the Court. *Ib.*

See *Inga v. The President, Directors, and Company of the Bank of Prince Edward Island,* 11 S. C. R. 265, p. 52.

## XII. AMENDING AND STRIKING OUT PLEADINGS.

### 1. Jurisdiction of Master.

In an action for damages for detention of dower, defendants pleaded (1) that the lands in question were wild, and plaintiff was not entitled to the sum claimed for damages, if any; (2) that plaintiff had assigned her claim for damages; (3) set off for moneys expended in respect of said lands; (4) that they did not detain, but were always willing, &c. On a motion in chambers, after issue joined, for an order directing a reference as to the damages under s. 47 O. J. Act, and upon evidence by affidavit both for and against the truth of the pleas, the master made an order striking out the 2nd and 3rd pleas, and directing a reference:—Held, that the master had no jurisdiction to make the order, and that the issues raised questions that were properly triable only at the hearing. *Ryan v. Fish et al., 10 P. R. 187.*—Dalton, *Master*—Proudfoot.

The master has no jurisdiction to make amendments to the pleadings after judgment; nor could he give leave to file a statement in his office raising a defence which ought to appear in the pleadings. *Hughes v. Rees,* 10 P. R. 301.—Hodgins, *Master in Ordinary.*

The plaintiff in a County Court action laid his venue at Toronto. The master in chambers changed it. On appeal, Boyd, C., discharged the master's order on the undertaking of the

plaintiff to pay the extra expense (\$25 to \$30) of a trial at Toronto. *Brigham v. McKenzie,* 10 P. R. 406.

Sembles, the master in chambers has not jurisdiction to change a venue under R. S. O. c. 50, s. 155, as the rule of court passed 1st February, 1870, under the authority of 33 Vict. c. 11, delegates to the master only the jurisdiction the judges of the superior courts then possessed in certain matters, and it was not till the passing of 35 Vict. c. 10 (1872.) that superior court judges had jurisdiction in such matters in County Court actions. Nor has the master in chambers power under Rule 420, O. J. Act, as that is limited to "actions and matters" in the High Court, and a motion of this kind is neither "matter" nor "proceeding" (s. 91 O. J. Act) in the High Court. *Ib.*

### 2. Other Cases.

Per Hagarty, C. J. O.—This court is allowed and required by law to give judgment "according to the very right and justice of the case," and up to the last moment has the right to make any amendment proper for the attainment of that end. Therefore where the defendants had by their answers admitted the truth of certain paragraphs of the bill which charged that they had severally purchased with notice of the claim of the plaintiff; but subsequently they swore that they did not intend to make such admission; that in fact they had not had such notice, and the admission was made in ignorance of its effect; the defendants up to the last stage of the proceedings should be at liberty to set up the facts as a means of defence. *Peterkin v. McFarlane,* 9 A. R. 429.

Amendment of pleadings by changing a breach of contract not proved into an action for breach of warranty. See *Ellis v. Abell,* 10 A. R. 226.

Claims on behalf of a wife for alimony and to set aside a conveyance of the husband's property as fraudulent should be joined in one action. Separate actions were brought for such claims, the five defendants appearing by the same solicitors, and filing separate statements of defence. A paragraph of each of the defences submitted that "the plaintiff had made out no case entitling her to relief." This was struck out by a local master, by five separate orders to the same effect:—Held, that the paragraph was neither scandalous, nor prejudicial, nor embarrassing under Rule 178, but was a mere reference to section 44 of the Judicature Act, and should not have been struck out and the costs of only one order were allowed. *Snider v. Snider, Snider v. Orr,* 10 P. R. 140.—Boyd.

A defence which is wholly inapplicable may be struck out, unless amended, although it is neither scandalous nor tending to prejudice, embarrass, or delay. *Chamberlain et al. v. Chamberlain et al.,* 11 P. R. 501.—Ferguson.

See *Ward v. Hughes,* 8 O. R. 138, p. 475; *Torrance et al. v. Livingstone,* 10 P. R. 29, p. 538; *Bank of Commerce v. Bank of British North America,* 10 P. R. 158, p. 534; *Ryan v. Fish,* 10 P. R. 187, p. 208; *Federal Bank v. Harrison,* 10 P. R. 271, p. 533; *Lauder v. Curran et al.,* 10 P. R. 612, p. 207; *Campbell v. James,* 11 P. R. 347, p. 537; *Greenizen v. Burns,* 13 A. R. 481, p. 539.

## XIII. COSTS.

The defendants, being sued as carriers for the loss of goods in transit under a contract between the plaintiffs and defendants, gave notice under Rules 107 and 108 to the third parties that they claimed indemnity from them, under a contract to which the plaintiffs were strangers; the third parties appeared, and an order was made that they should be at liberty to assist in defending the action and should be bound by the result as regards the liability of the defendants to the plaintiffs. The plaintiffs were nonsuited at the trial:—Held, that the plaintiffs were not liable for the costs of the third parties, or for the costs occasioned by joining them; nor were the defendants liable for such costs. *Tomlinson et al. v. The Northern Railway Company of Canada et al.*, 11 P. R. 419.—Armour.

See *Coughlin v. Hollingsworth*, 5 O. R. 207, p. 137.

## PLEDGE.

See BROKER.

## POLICE.

See CONSTABLE.

The plaintiffs appointed the defendant chief of police of the town of Stratford, at a named salary, but stipulated that he should act as county constable within the town only, and account for and pay over to the plaintiffs all fees received by him from the county as a reward for services performed by him as county constable:—Held, that under 5 and 6 Edw. VI. c. 16, and 49 Geo. III. c. 126, the agreement to account for such fees was invalid. *The Corporation of the Town of Stratford v. Wilson*, 8 O. R. 104.—Rose.

Quære, whether the plaintiffs, or the Board of Police Commissioners, had the power to appoint the defendant; and whether, apart from the statutes above mentioned, it was not ultra vires of the plaintiffs to bargain with the defendant for the accounting to them for the fees of another office not under their control. *Ib.*

## POLICE MAGISTRATE.

## I. APPOINTMENT, 543.

## II. JURISDICTION AND TRIALS BEFORE, 544.

## I. APPOINTMENT.

The court declined to hear discussed the question whether the police magistrate in this case, if appointed only by the Ontario Government, was legally or validly appointed, as his appointment should have been by the Dominion, the patent by the Ontario Government only being produced, and it not appearing that no commission by the Dominion had issued to him, nor that any search or enquiry had been made at the proper office as to the fact, the only other evidence as to the appointment, besides the mere

production of the Ontario patent, being the defendant's affidavit stating that the magistrate had no authority or appointment from the Crown or Governor-General of the Dominion, and that he knew this "of common and notorious report." *Regina v. Richardson*, 8 O. R. 651.—Q. B. D.

Per Wilson, C.J., the power to appoint police magistrates rests with the Ontario Government. *Richardson v. Ransom*, 10 O. R. 387.

## II. JURISDICTION AND TRIALS BEFORE.

The defendant sold to C., amongst other things, a horse-power and belt, part of his stock in the trade of a butcher, in which he also sold a half-interest to C. The horse-power had been hired from one M., and at the time of the sale the term of hiring had not expired. At its expiry, M. demanded it, and C. claimed that he had purchased it from defendant. The defendant then employed a man to take it out of the premises where it was kept and deliver it to M., which he did. The defendant was summarily tried before a police magistrate and convicted of an offence against 32-33 Vict. c. 21, s. 110 (Donn.).—Held, that the conviction was bad, there being no offence against that section, and no jurisdiction in the police magistrate to try summarily. *Regina v. Young*, 5 O. R. 400.—Rose.

Held, that a police magistrate cannot reserve a case for the opinion of a Superior Court under Con. Stat. U. C. c. 112, as he is not within the terms of that Act. *Regina v. Richardson*, 8 O. R. 651.—Q. B. D.

Held, that a defendant is not entitled to remove proceedings by certiorari, to a superior court from a police magistrate or a justice of the peace after conviction, or at any time, for the purpose of moving for a new trial for the rejection of evidence, or because the conviction is against evidence, the conviction not being before the court and no motion made to quash it. But—Held, that even had the conviction in this case been moved to be quashed, and an order nisi applied for upon the magistrate and prosecutor for a mandamus to the former to hear further evidence, which he had refused, both motions would have been discharged, the magistrate appearing to have acted to the best of his judgment and not wrongfully, and his decision as to the further evidence involving a matter of discretion with which the court would not interfere. *Ib.*

See *Regina v. Scott et al.*, 10 P. R. 517, p. 74.

## POLICY.

See INSURANCE.

## POSSESSION.

## I. OF CHATTELS.

1. *Change of Possession*—See BILLS OF SALE AND CHATTEL MORTGAGES.

## II. OF LANDS.

1. *Title by*—See LIMITATION OF ACTIONS.

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TATION OF ACTIONS

2. *Refusal to Surrender*—See **LANDLORD TENANT.**
3. *Recovery of Possession*—See **EJECTMENT.**
4. *Delivery of Possession*—See **SALE OF LAND.**
3. *Order for Immediate Possession*—See **RAILWAYS AND RAILWAY COMPANIES.**

## POUNDAGE.

See **SHERIFF.**

## POUNDS AND POUND-KEEPER.

See **IMPOUNDING ANIMALS.**

## POWER OF APPOINTMENT.

See **WILL.**

See *Smith v. McLellan*, 11 O. R. 191, p. 308.

## POWER OF SALE.

See **MORTGAGE.**

## PRACTICE.

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2. *Service.*  
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### III. CONSOLIDATING ACTIONS, 548.

### IV. DISCLAIMER, 549.

### V. DISMISSING ACTIONS FOR WANT OF PROSECUTION, 549.

### VI. TRANSFERRING CAUSES FROM ONE DIVISION OF THE HIGH COURT TO ANOTHER DIVISION—See **HIGH COURT OF JUSTICE.**

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(b) *Mortgage Suits*—See **MORTGAGE.**
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### XV. ESTOPPEL IN MATTERS OF PRACTICE, 559.

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### XVII. COMPUTATION OF TIME—See **TIME.**

### XVIII. CONTROVERTED ELECTIONS—See **PARLIAMENTARY ELECTIONS.**

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### XX. IN COUNTY COURTS—See **COUNTY COURTS.**

### XXI. IN DIVISION COURTS—See **DIVISION COURTS.**

### XXII. IN PARTICULAR ACTIONS AND PROCEEDINGS—See **THE SEVERAL TITLES.**

### I. WRITS.

#### 1. *Endorsement.*

A writ of summons not endorsed with a statement of the plaintiff's residence as set out in Form 1 O. J. Act, is irregular. *Sherwood et al. v. Goldman*, 11 O. R. 433.—Dalton, *Master*.

The writ of summons was issued against three defendants, O., A., and R. The indorsement claimed to have set aside a deed from A. to O., and a deed from O. to A. No claim whatever was made against R. and he was not mentioned in the indorsement:—Held, that the indorsement was sufficient, and a motion by R. to set aside the service upon him was refused. *Giltmore v. The Township of Orford et al.*, 11 P. R. 437.—Dalton, *Master*.

#### 2. *Service.*

##### (a) *Service out of Ontario.*

In an action for damages for breach of contract by the defendants, a corporation in Liverpool, England, in not delivering certain machinery at the railway station nearest to Ottawa, the writ and statement of claim were served on the defendants' agent in Montreal, and under Rule 48, O. J. Act, the plaintiffs now applied for an order allowing the service, on the ground that the case was one within Rule 45. The affidavit made and filed by the plaintiff's solicitor set out: "2. The paper writing shown to me, marked Exhibit A, is a true copy of the statement of claim delivered in this action. 3. This action is brought

to recover damages for breach of contract on the part of the defendants in not delivering the machinery, in the statement of claim mentioned, at the railway station nearest to Ottawa under the terms of the contract." But the affidavit did not state that the deponent knew the fact, either of his own knowledge or on information and belief, nor that the defendants ever entered into a contract with the plaintiff, and undertook to deliver the machinery at the railway station nearest to Ottawa. The bill of lading containing the contract in question provided inter alia, "that the machinery in question is to be delivered at the port of Montreal unto the G. T. R. Co., by them to be forwarded upon the conditions above and hereinafter expressed, thence per railway to the station nearest to Ottawa, and at the aforesaid station delivered to order \* \* freight \* \* to be paid by the consignees." "That the goods are to be delivered from the ship's deck, when the shipowner's responsibility shall cease. Through goods sent forward by rail are deliverable at the railway station nearest to the place named hereafter." "That any loss, damage, or detention of goods on this through bill of lading for which the carrier is liable must be claimed against the party only in whose possession the goods were when the loss, damage, or detention occurred":—Held (1), that the affidavit did not afford the proof required under Rule 48; (2), that the bill of lading showed no contract on the part of the defendants to deliver at Ottawa, or the nearest station to Ottawa; nor any contract, the breach of which was made in Ontario, because, if there was such a contract in the bill, force and effect could not be given to the stipulations in it that the shipowner's responsibility should cease when the goods were delivered from the ship's deck, &c., and hence, though leave would be given, to file further affidavits; such leave was therefore unnecessary. And, again, if there was a contract, and its terms expressly exempted the defendants from any and all liability for damages for any loss, etc., arising beyond their line, no damage for a breach in this province would result to the plaintiff, and though technically within Rule 45, sub-s. c., discretion should (if any exist), be exercised in refusing to allow the service. *Perkins v. Mississippi and Dominion Steamship Co. (Limited)*, 10 P. R. 193.—Rose.

In cases of this kind an order allowing service should not be made on an undertaking of the plaintiff's solicitor to prove a cause of action, &c., within the jurisdiction as it shifts the onus of proof to the plaintiff and requires him to conduct possibly a long and expensive litigation to procure a decision on a point properly raised at the commencement of the action. *Ib.*

Two of the defendants lived in Chicago, Ill., and had no solicitor in the county where the action was begun:—Held, that the local judge of the county in which the action was begun had no jurisdiction under Rule 422, O. J. Act, to make an order for substitutional service of process on these defendants. *Locomotive Engine Co. v. Copeland et al.*, 10 P. R. 572.—Rose.

Debts owing to the defendant from persons living in Ontario are assets in Ontario which may be rendered liable to the judgment within the meaning of Rule 45 (e) O. J. Act. *Purves v. Slater*, 11 P. R. 507.—Rose.

Waiver of objections as to sufficiency of service. See *Dart v. Citizens Insurance Co.*, 11 P. R. 513, p. 559; *In re Guy v. The Grand Trunk R. W. Co.*, 10 P. R. 372, p. 559.

## II. APPEARANCE.

The plaintiff issued a writ of summons, and registered a certificate of his lis pendens upon the lands of the defendant Toothie. The defendant not having been promptly served with the writ, and being anxious to get rid of the suit entered an appearance gratis. The master at London made an order in chambers upon the application of the plaintiff striking out the appearance:—Held, upon appeal, that there is nothing in the Judicature Act or rules which interferes with the well-recognized practice that a defendant has a right to appear voluntarily, and to anticipate the service of actually issued process. Especially should his privilege to appear gratis be preserved in a case where his property is directly and prejudicially affected by the commencement of the action and the registration of its pendency. Appeal allowed, with costs in the cause to the defendant in any event. *McTaggart v. Toothie et al.*, 10 P. R. 261.—Boyd.

In an action of ejectment, G., the landlady of the defendant C. intervened and appeared to the writ. C. did not appear until statement of claim delivered, when he appeared and joined with G. in the statement of defence:—Held, that the appearance of C. was regular. *Goring v. Cameron*, 10 P. R. 496.—Dalton, Master—Osler.

In an action for foreclosure the defendant entered an appearance under Rule 68, O. J. Act, limiting his defence to one item in the particulars indorsed on the writ of summons. The appearance did not state the defendant did not require the delivery of a statement of claim:—Held, that after such appearance a statement of claim was unnecessary, and a judgment signed upon it, for default of a statement of defence, was set aside, with costs. *Peel v. White*, 11 P. R. 177.—Dalton, Master.

## III. CONSOLIDATING ACTIONS.

The plaintiffs in their first action claimed from the defendants a sum of \$200,000 as the balance due upon a construction contract, and in this action, begun some time after the first, they claimed from the same defendants a sum of \$3,000, the amount of an account for goods sold and delivered. The cause of action herein arose before the commencement of the previous action. The first action was practically consolidated with an action of the defendants against the plaintiffs in the Chancery Division:—Held, that the two claims should have been made in the one action, and that it was a proper exercise of discretion to leave the claim in this action to be tried with the claim to which it should originally have been joined. *Connors et al. v. The Canadian Pacific Railway Company (No. 2)*, 11 P. R. 222.—C. P. D.

The Master in Ordinary has no jurisdiction to consolidate actions in which judgments have been entered, and in which references are pending in his office. *Boswell v. Grant et al.*, 11 P. R. 376.—O'Connor.

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V. DISMISSED

Held, that an answer to be sufficient action for plaintiffs sufficiently of nearly proceeding with costs Railway 325.—Rose.

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VII. JUDGMENT

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efficiency of service Co., 11 P. R. 241. —*The Grand Trunk Co.*

See *Miller et al. v. Confederation Life Association—Confederation Life Association v. Miller et al.*, 11 P. R. 241, p. 558.

#### IV. DISCLAIMER.

See *Beard v. Credit Valley Railway Co.*, 9 O. R. 616, p. 139; *Wansley v. Smallwood*, 11 A. R. 439, p. 140.

#### V. DISMISSING ACTIONS FOR WANT OF PROSECUTION.

Held, that the filing of a statement of claim and an undertaking to speed is not a sufficient answer to a motion to dismiss. The delay must be sufficiently explained. In this case, being an action for a large claim against sureties, the plaintiffs not having in the opinion of the court sufficiently explained, offered excuse for a delay of nearly two years, or shewn a probability of proceeding speedily, the action was dismissed with costs. *Napance, Tamworth, and Quebec Railway Company v. McDonnell et al.*, 10 P. R. 325.—Rose.

If the plaintiff without good excuse neglect to proceed with the action, the court will not, as of course, on his mere undertaking to speed the action and paying the costs, refuse to dismiss, but where defendant's solicitor had refused to accept notice of trial a few hours late, an order refusing to dismiss and permitting the plaintiff to proceed was affirmed. *Carter v. Barker*, 11 P. R. 1.—Rose.

An order made at chambers under Rule 255, O. J. Act, dismissing the action for want of prosecution where issue had been joined, but the case had not been set down for trial nor notice of trial given, was:—Held not a dismissal on the merits and not a bar to a subsequent action for the same cause. *Roberts v. Lucas*, 11 P. R. 3.—Rose.

An order of the 4th October, 1886, extended the time for the delivery of statement of claim till the 12th October, but provided if it was not so delivered, the action should stand dismissed, with costs. Upon failure to deliver in time, the defendant signed judgment dismissing the action:—Held, that notwithstanding the dismissal of the action, an order could properly be made under Rule 462 vacating the judgment, and further extending the time for delivering the statement, and the master in chambers had jurisdiction to make such an order. *Newcombe v. McLuhan*, 11 P. R. 461.—Wilson.

#### VII. JUDGE, LOCAL JUDGE, AND MASTER IN CHAMBERS.

##### 1. Jurisdiction.

###### (a) Judge.

There is nothing to prevent a judge sitting at the Assizes hearing a chambers motion, if he is disposed for the purpose to treat the court room as his chambers. *The Sarnia Agricultural Implement Manufacturing Co. v. Pertue*, 11 P. R. 224.—C. P. D.

A judge in chambers has no power to rescind his own order for a writ of ca. sa. or to discharge

the defendant from custody after the order has been acted upon. *McNabb v. Oppenheimer*, 11 P. R. 214.—Rose.

Jurisdiction to grant administration orders. See *In re Munsie*, 10 P. R. 98.

See *Grant v. Grant*, 10 P. R. 40, p. 144; *Hilliard v. Arthur*, 10 P. R. 281; *S. C. Jb.* 426, p. 551; *Ryan v. The Canada Southern R. W. Co.*, 10 P. R. 535, p. 144, *infra*; *Regina v. Arscott*, 9 O. R. 541, p. 633; *Brown v. Nelson*, 11 P. R. 121, p. 652.

##### (b) Local Judge.

The plaintiff's solicitors lived at Sandwich, and the defendant's solicitors at Toronto. The local judge at Sandwich in November, 1884, made an ex parte order for leave to the plaintiff to amend the writ of summons before service, and subsequently set aside his own order on the defendant's application, on notice to the plaintiff and after argument by counsel on behalf of both parties. The plaintiff appealed from the second order to a judge in chambers at Toronto:—Held, that the local judge had no power to make the rescinding order under Rule 422, O. J. Act. *Ryan v. Canada Southern R. W. Co.*, 10 P. R. 535.—Rose—C. P. D.

Subsequently the defendants made a substantive motion before the same judge in chambers at Toronto, to set aside the original order of the local judge:—Held, that save as excepted, a local judge of the High Court in proceedings in the High Court having the same power in chambers as a judge of the High Court in chambers as to the matters referred to in the Judicature Act Rules, he is a judge of co-ordinate jurisdiction with a judge of the High Court in chambers. A judge of the High Court has, therefore, no power to review the decision of a local judge, save by way of appeal in the manner provided by the Judicature Act Rules; and that this motion could not be treated as an appeal as it was too late under Rule 427, O. J. Act. *Ib.* See also *Locomotive Engine Co. v. Copeland et al.*, 10 P. R. 572; *Jamieson v. Prince Albert Colonization Co.*, 11 P. R. 115.

Held, following the former Chancery practice, that a local judge may make an ex parte order for the examination of a witness de bene esse, on the ground that he is dangerously ill, and not likely to recover. *Baker v. Jackson*, 10 P. R. 624.—Rose.

A local Judge of the High Court has no power to order the discharge of a defendant held in custody under a ca. sa. issued out of the High Court of Justice. *Cochrane Manufacturing Co. v. Lamont*, 11 P. R. 351.—Galt.

##### (c) Master in Chambers.

Jurisdiction to grant administration orders. See *In re Munsie*, 10 P. R. 88.

After judgment has been entered against an absconding debtor pursuant to the finding of a County Court judge on a reference under R. S. O. ch. 68, sec. 9, the master in chambers has no jurisdiction to set aside the judgment at the instance of another creditor who wishes to be let in to defend. *Wills v. Carroll* 10 P. R. 142.—Chy. D.

The plaintiff not appearing at the trial, which took place at the Picton Assizes, before Patterson, J. A., judgment was directed to be entered for the defendant, with costs. Application was subsequently made to the judge at the same assizes to set aside the judgment and reinstate the case on the list. This was refused, the plaintiff not being then ready to go on. Application was then made by the plaintiff to the master in chambers under Rule 270 O. J. Act, to set aside the judgment entered at the trial. This motion was enlarged before Rose, J., in chambers, who:—Held, that Rule 270 O. J. Act does not give jurisdiction to the master or a judge in chambers in such cases. *Hilliard v. Arthur*, 10 P. R. 281; *S. C.*, *ib.*, 426—Q. B. D.

A judicial officer cannot delegate the discharge of his judicial functions to another unless expressly empowered so to do. The various kinds of references to judicial officers under the Ontario Judicature Act commented upon. *In re Queen City Refining Co.*, 10 P. R. 415.—Hodgins, *Master in Ordinary*.

The master in chambers, and local masters and County Judges, acting under Rule 422 O. J. Act have no jurisdiction under sections 47 and 48, O. J. Act to order references in opposed cases. *White v. Beemer*, 10 P. R. 531.—Boyd.

Held, following *White v. Beemer*, 10 P. R. 531, that the master in chambers has no jurisdiction to order a reference under sec. 47 O. J. Act. An appeal from the master's order directing a reference was treated as a substantive motion, and a reference was directed, under Rule 323 O. J. Act. *The Union Loan and Savings Company v. Beemer*, 10 P. R. 630.—Rose.

The jurisdiction of the master in chambers to grant a quo warranto summons under the Municipal Act, 1883 (Ont.), is established by the 13th sec. of the Administration of Justice Act, 1885. *Regina ex rel., Felitz v. Howland*, 11 P. R. 264.—Dalton, *Master*.

The master in chambers is not, in any sense, by delegation or otherwise, a judge of the High Court of Justice to whom power is given by the Municipal Act, 1883, to try and determine cases of controverted municipal elections; nor can such power be given him by the acquiescence of the parties. *Regina ex rel., Wilson v. Duncan*, 11 P. R. 379.—O'Connor.

Under Dominion Insolvent Company's Acts. See *In re Queen City Refining Co.*, 10 P. R. 415, p. 124; *Re Joseph Hall Manufacturing Co.*, 10 P. R. 485, p. 125.

As to striking out pleadings. See *Ryan v. Fish et al.*, 10 P. R. 187, p. 541.

As to changing venue. See *Brigham v. McKenzie*, 10 P. R. 406, p. 542.

See *Newcombe v. McLuhan*, 11 P. R. 461, p. 549.

## 2 Appeal from Master in Chambers

A writ was endorsed specially for \$910, the amount of a bill of exchange, and also asked to have certain conveyances, &c., set aside as fraudulent. The master in chambers made an order for judgment under Rule 80 O. J. Act, on January

11th. Proudfoot, J., on an ex parte application of the defendant for leave to bring on an appeal from the master's order on the 17th January, directed the appeal to be set down for Monday, January 21st:—Held, that the appeal was properly brought. *Standard Bank v. Wills*, 10 P. R. 159.—Ferguson.

No objection to his jurisdiction was taken before the master:—Held, that the application having been entertained, an appeal to a judge in chambers of the Chancery Division, instead of to a judge of the C. F. or Q. B. Divisions, was proper under R. S. O. c. 39, s. 31, and Rule 427 O. J. Act, the effect of the O. J. Act being to abolish all distinctions between Superior Courts of law and equity. *Brigham v. McKenzie*, 10 P. R. 406.—Boyd.

An appeal from the master's order refusing costs was dismissed, without costs, where the affidavit in denial of special directions contained impertinent and scandalous matter. *Vanstaalen v. Vanstaalen*, 10 P. R. 428.—Osler.

Appeals from the master in chambers may be brought on for hearing before a judge of the High Court sitting in chambers without reference to the division in which the action is commenced. *Laidlaw Manufacturing Company v. Miller*, 11 P. R. 335.—Armour.

An appeal lies to a judge in chambers from the decision of the master in chambers, under Rule 544, O. J. Act, upon appeal from a pending taxation. *Re Monteith—Merchants Bank v. Monteith*, 11 P. R. 361.—Boyd.

## VIII. MASTER IN ORDINARY.

### 1. Jurisdiction.

#### (a) Generally.

The plaintiffs, when taking accounts before the master under the ordinary chamber order for the administration of personal estate, sought to have it declared that a bequest to R., who was one of the witnesses to the will, was valid:—Held, 1. That the master had no jurisdiction, under such order and on oral pleadings, to adjudicate upon the validity of the will: 2. That even if there was such jurisdiction it could not be exercised in the absence of a personal representative of R.'s estate. *In re Munroe*, 10 P. R. 98.—Hodgins, *Master in Ordinary*.

By an agreement for the sale of certain land, the vendor was to give a good marketable title, of which the purchaser was to satisfy himself at his own expense, and was not to call for any abstract of title, deeds, or evidences of title other than those in the vendor's possession. Subsequently, on a reference in a suit by the vendor for specific performance, the defendant filed three objections to the title having reference to a small portion of the land, which were answered by the plaintiff, and the reference was proceeding when the defendant applied and obtained from the master leave to file other objections. On appeal. Proudfoot, J.:—Held, that the master in ordinary had no jurisdiction to grant such leave, but on a subsequent application to the court he gave the leave required on terms. *Clarke v. Langley*, 10 P. R. 208.—Hodgins, *Master in Ordinary*—Proudfoot.

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The master has no jurisdiction to make amend-  
ments to the pleadings after judgment; nor could  
he give leave to file a statement in his office  
raising a defence which ought to appear in the  
pleadings. *Hughes v. Rees*, 10 P. R. 301.—Hod-  
gins, *Master in Ordinary*.

In proceeding on a judgment for winding up a  
company, the former solicitor of the company  
brought in a claim for bills of costs alleged to be  
due him, which the former master referred to one  
of the taxing officers to tax :—Held, that the mas-  
ter had authority to direct such reference. *Clarke*  
*v. Union Fire Ins. Co.*—*Caston's Case*, 10 P. R.  
339.—Hodgins, *Master in Ordinary*.

In proceeding under a judgment for the wind-  
ing up of a company, the master has the same  
jurisdiction to try claims for unliquidated dam-  
ages arising out of breach of contract as he would  
have in an administration proceeding. *Id.*

As to power of master in ordinary to order  
payment of insurance money into court in a case  
where the administration of the testator's estate  
had been referred to him. See *Merchants Bank*  
*v. Monteith*; *Ex parte Standard Life Insurance*  
*Co.*, 10 P. R. 588.

Held, that on a chamber reference for parti-  
tion or sale of lands made by the master in  
chambers, the master in ordinary has no juris-  
diction to try the question of the validity of a  
lease under seal from the intestate, set up as a  
ten years' lease by one of the heirs-at-law, who  
claimed that the lands should be sold subject to  
his lease, some of the other heirs-at-law disputing  
the validity of the lease, and alleging that it was  
either a five years' lease, or that there had been  
a fraudulent alteration of the sealed instrument,  
there being an alteration in a material part ap-  
parent on the face. The reference was adjourned  
till after the trial of the question raised, and an  
issue was directed by a judge in chambers under  
Rule 256, O. J. Act, to be tried at the next sittings  
for the trial of actions in the Chancery Division;  
the lessee to be plaintiff in the issue. *Re Rogers*—  
*Rogers et al. v. Rogers et al.*, 11 P. R. 90.—  
Hodgins, *Master in Ordinary*—Ferguson.

The master in ordinary has no jurisdiction to  
consolidate actions in which judgments have been  
entered, and in which references are pending in  
his office. *Boswell v. G. et al.*, 11 P. R. 376.—  
O'Connor.

See *In re The Queen City Refining Co.*, 10 P. R.  
415, p. 124.

## 2. Proceedings in Master's Office.

### (a) Generally.

In his pleadings, in an action for an account  
the plaintiff set up that on April 23rd, 1878, he  
transferred to the defendant 160 shares of a cer-  
tain bank, as a security for a loan, and that pend-  
ing the loan the defendants had sold the said  
stock and realized more than the indebtedness,  
whereof he claimed an account, and the parties  
went to trial on admissions that the bank stock  
was in the defendants' hands at the said date.  
In the master's office the plaintiff sought to raise  
an issue as to whether the defendants actually  
did hold the bank stock on that date, or whether,  
having held it previously as security for another  
loan, they had not parted with it before the said

date, and falsely represented to the plaintiff that  
they still held it, and whether they were not  
liable to be charged with its market value as of  
that date :—Held, affirming the decision of the  
master in ordinary, that the plaintiff could not  
be allowed thus to set up a different state of  
facts and cause of action from that spread upon  
the record. *Carnegie v. Federal Bank of Canada*,  
8 O. R. 75.—Boyd.

The jurisdiction in chambers to grant ad min-  
istration orders, applies only to simple cases of  
accounts, and the judge or master in chambers,  
may take the administration accounts in cham-  
bers without referring them to the master's office.  
But to all such references Chancery Order 220  
applies. *In re Munsie*, 10 P. R. 98.—Hodgins,  
*Master in Ordinary*.

Where, on an application for such order, it  
appears that there is a substantial and prelimi-  
nary question to be decided, such question should  
be decided before the reference is ordered; and  
the court may limit a time within which the par-  
ties may try the issue. But if the issue is not  
tried, or the order is made in chambers without  
first directing such issue, the parties are held to  
have waived such preliminary question, and can-  
not raise it in taking the accounts under such  
order in the master's office. *Id.*

The jurisdiction of the master's office is not  
co-extensive with that of the court in enquiring  
into and adjudicating upon the validity of docu-  
ments; and there is no authority to support any  
implied or assumed delegation of the functions of  
the court to the master. Nor is there any prac-  
tice in the master's office which allows parties to  
obtain a reference to the master so as to evade  
the ordinary judicial functions of the court, and  
then invoke those judicial functions in a tribunal  
of delegated and subordinate jurisdiction. *Id.*

Admissions made before the master in the course  
of a reference should be put into writing and  
signed by the party making the same. *Poster v.*  
*Allison*, 11 P. R. 233.—Boyd.

Manner of taking accounts in fixing an occu-  
pation rent to be charged against one who had  
occupied land under mistake of title. See *Mun-  
sie v. Lindsay et al.*, 11 O. R. 520.

### 3. Appeal From.

Where, after the argument in chambers of an  
appeal from the master's report, counsel for one  
of the parties asked that the appeal might be  
treated as though argued in court, and any order  
made thereon issue as a court order; or, at all  
events, that costs should be allowed as of a court  
motion :—Held, that although the appeal would,  
on account of its nature, have been adjourned  
into court, if such adjournment had been asked  
before the argument of it, the present application  
was too late, and the court had no power to grant  
it. *Re Fleming*, 11 P. R. 272.—Ferguson.

## IX. POWERS OF REGISTRAR.

The registrar of a Divisional Court has power  
to receive evidence by affidavit to shew that an  
order of court has not been obeyed, and to en-  
force the order by striking out paragraphs of the  
defence. *Hamilton Road Co. v. Platt*, 10 P. R.  
581.—Dalton, *Master*.

## X. LOCAL MASTERS.

## 1. Jurisdiction.

Rule 422 O. J. Act and its subsection (a) must be read together, and hence the limitation: in the subsection of the jurisdiction of the county judge in certain cases curtails that of local masters in similar cases. The local master at Hamilton in the county of Wentworth gave leave to sign final judgment under Rule 80 O. J. Act, in an action in which the solicitor for the defendant had his place of residence and office at St. Catharines, in the county of Lincoln, and no office in Hamilton:—Held, that under Rule 422, O. J. Act, the local master had no jurisdiction to make the order. *Freel v. Macdonald*, 10 P. R. 170.—Boyd.

The plaintiff, as mortgagee of the defendants, by an instrument dated January 30th, 1883, purporting to be duly executed by the plaintiff, commenced an action for the sale of the mortgaged property. The writ issued duly indorsed under Rule 17 O. J. Act, and default being made, judgment was obtained under Rule 78 O. J. Act referring it to the master at Lindsay to make and take the enquiries and accounts as prescribed by G. O. Chy. 441 (form 168 O. J. Act). The master gave certain execution creditors, who had been made parties in his office and proved their claims, priority over the plaintiff on the ground that the instrument in question was invalid, the terms of s. 85 of the Canada Joint Stock Company's Act of 1877, which requires the sanction of a two-thirds vote of the shareholders, not having been complied with:—Held, that under the decree the master had no power to adjudicate upon the validity of the instrument in question as a mortgage, and the execution creditors not having moved against the judgment by virtue of which they were made parties were also bound by the decree. *McDougall v. Lindsay Paper Mill Co.*, 10 P. R. 247.—Boyd.

Local masters and County Court judges acting under Rule 422 O. J. Act have no jurisdiction, under ss. 47 and 48 O. J. Act, to order references in opposed cases. *White v. Beemer*, 10 P. R. 531.—Boyd.

## 2. Confirmation of Report.

A decree directed a reference to a local master to ascertain such sums as would be sufficient to satisfy the damages complained of, awarded costs and directed payment to be made forthwith after the making of the report:—Held, that the report did not require confirmation, and therefore that executions issued under it by the plaintiff were valid; but pending an appeal from the report the executions were stayed in the sheriff's hands. *Lewis v. The Talbot St. Gravel Road Co. et al.*, 10 P. R. 15.—Osler.

## 3. Appeals From.

The solicitors for the defendants (except L.) had given due notice of appeal, but through inadvertence set down the appeal on behalf of the defendants the gravel road company only. Under the circumstances stated in the judgment the other defendants were allowed to set down their appeal. *Lewis v. The Talbot Street Gravel Road Co. et al.*, 10 P. R. 15.—Osler.

An ex parte order for the production of documents was made by the local master at Belleville on the 17th August, 1885, and an order was made by the same officer on the 9th September, 1885, refusing to rescind his former order. The defendants appealed from the latter order:—Held, that the appeal was, in effect, an appeal from the original order, as the result, if the appeal were successful, would be to rescind that order, and the appeal was therefore dismissed as too late, under Rule 427 O. J. Act. *Jamieson v. Prince Albert Colonization Co.*, 11 P. R. 115.—Ferguson.

An appeal from an order made by a local master, on Saturday the 17th April, was set down to be heard on Monday the 26th April, which was Easter Monday, a dies non. The appeal was put on the paper for the following Monday:—Held, that this course was proper and convenient, and also that the proper mode of objecting to the appeal was by a motion to strike it off the list as improperly set down. *McCaw v. Ponton*, 11 P. R. 328.—Boyd.

There should be no alteration in the amount found due by the master when such amount has not been appealed against. Judgment of Proudfoot, J., 11 O. R. 611, upheld in part. *Gordon et al. v. Gordon et al.*, 12 O. R. 593.—Chy. D.

## XI. NOTICE OF MOTION.

An objection that a notice of motion given for a sittings of the Divisional Court, and served in time to be set down during that sittings, could not be set down in the following sittings, was overruled. *Brassett v. McEwan et al.*, 6 O. R. 179.—C. P. D.

Where the defendant's solicitor was served with a short notice of motion, which was admitted to be defective:—Held, that the defendant was not entitled to the costs of counsel attending on the motion merely to show that the notice was irregular. *Waller v. Claris*, 11 P. R. 130.—Wilson.

Where a defendant, upon being sued in the First Division Court in the county of Middlesex, filed a notice disputing the jurisdiction and served a notice of motion returnable before a judge in chambers, for an order directing the issue of a writ of prohibition to the said Division Court, to prohibit the judge thereof and the plaintiff from proceeding with the suit in that Division Court on the ground of want of jurisdiction in that court to hear and determine the same, but did not entitle his notice of motion, nor the affidavit filed in support of the motion, in any Division of the High Court of Justice:—Held, affirming the order of O'Connor, J., in chambers, granting the writ, not a fatal objection, but one which could and should be amended under Rule 474, O. J. Act. *Re Olmstead v. Errington*, 11 P. R. 366.—Q. B. D.

Where a party obtains an enlargement of a motion for the purpose of procuring further affidavits, but does not comply with the terms on which the enlargement was granted, he is not entitled to read the affidavits. *Campbell v. Martin*, 11 P. R. 509.—Ferguson.



## XV. ESTOPPEL IN MATTERS OF PRACTICE.

The defendant on hearing of the judgment having been entered against him in Manitoba, instructed counsel to move to set the same aside, but the application was refused on the ground that it was too late:—Held, that this did not preclude defendant from disputing the validity of the judgment in an action thereon in this province. *McLean v. Shields et al.*, 9 O. R. 699—C. P. D.

## XVI. WAIVER OF IRREGULARITIES.

Held, that when a foreign commission had been opened before trial for the convenience of parties it was too late at the trial to object to the mode of its execution. *Walton v. Apjohn*, 5 O. R. 65—Q. B. D.

Leave was given to the plaintiff to amend by setting up the Statute of Limitations upon payment of costs, which were paid to and accepted by the defendant. Upwards of a year afterwards the defendant objected that such order had been improperly made:—Held, that it was then too late to object that the order had been made in error. *Court v. Walsh*, 9 A. R. 294.

Held, that the service of the writ in this action on the station master of the defendants at Bowmanville was void, but the defendants having appeared at the trial and after their objection to the jurisdiction had been overruled having proceeded with the defence and cross examined witnesses, &c.:—Held, that they had thereby precluded themselves from objecting to the jurisdiction. *In re Guy v. Grand Trunk R. W. Co.*, 10 P. R. 372.—Osler.

The defendants appeared to the writ of summons, and set up in their statement of defence that the High Court of Justice had no jurisdiction; that the cause of action arose in Winnipeg, the defendants' head office was at Montreal, and the service of process was on their agent for local purposes at London:—Held, that there was nothing in these facts to shew want of jurisdiction; and that the appearance had precluded all question as to the sufficiency of the service. *Dart v. Citizens Ins. Co.*, 11 P. R. 513.—Dalton, Master.

Waiver in pleading. See *Hughes v. Rees*, 10 P. R. 301.

See *Cochrane Manufacturing Co. v. Lamon*, 11 P. R. 162, p. 29; *Re The Merchants Bank v. Van Allen*, 10 P. R. 348, p. 202; *Hughes v. The British America Ins. Co.*, and *Hughes v. The London Assurance Co.*, 7 O. R. 465, p. 139; *In re Munzie*, 10 P. R. 98, p. 262.

## PREFERENTIAL ASSIGNMENTS.

See FRAUDULENT CONVEYANCES.

## PRESCRIPTION.

See LIMITATION OF ACTIONS.

## PRESUMPTIONS.

See EVIDENCE.

## PRINCIPAL AND AGENT.

I. EVIDENCE OF AGENCY, 560.

II. REMUNERATION AND COMMISSION, 560.

III. POWER AND AUTHORITY OF AGENT, 561.

IV. LIABILITY OF PRINCIPAL FOR ACTS OF AGENT, 562.

V. LIABILITY OF AGENT TO PRINCIPAL, 562.

VI. RIGHT OF PRINCIPAL TO CONTRACT MADE BY AGENT, 562.

VII. MISCELLANEOUS CASES, 563.

VIII. AGENCY IN ELECTIONS—See PARLIAMENTARY ELECTIONS.

IX. PARTICULAR AGENTS—See THE SEVERAL TITLES.

## I. EVIDENCE OF AGENCY.

D. agreed to purchase certain lands as agent for K., and accordingly executed an agreement for the purchase of the same in her own name. Held:—That the evidence of D.'s agency was receivable though not in writing, and that no subsequent dealing of D., as by acquiring the legal estate, could operate to the disadvantage of K. Quære, whether *Bartlett v. Pickersgill*, 1 Cox. 15, 4 East 577, n. is still to be regarded as good law. *Kitchen v. Dolan*, 9 O. R. 432.—Boyd.

## II. REMUNERATION AND COMMISSION.

Where a by-law of a municipality appointed a health officer, but did not fix his salary:—Held, that the law would fix his salary at a reasonable sum, regard being had to the services performed. *Bogart v. The Corporation of the Township of Seymour*, 10 O. R. 322.—Ferguson.

Land agents have no right to accept commission from parties with whom they deal without the fullest notice to their employers that they hold themselves at liberty to do so, and assent on the letter's part to such right; but neither express notice or assent is necessary. It is sufficient if from the nature of the circumstances the principal must have been aware of the fact, and by making no active objection must be deemed to intend to make none; and in the absence of specific agreement to the contrary commission must be estimated on the whole value of the property without regard to incumbrances. In this case, where the defendants agreed to pay plaintiff, a land agent, one-and-a-half per cent. commission on the sale of his land; and it appeared that without notice or knowledge by defendants, the plaintiff obtained one per cent. commission from the purchaser, he was—Held only entitled to charge the defendants the difference or a half per cent. commission; and there being no agreement to the contrary such commission was computed on the whole of the property without regard to incumbrances. *Culverwell v. Biney et al.*, 11 O. R. 265—C. P. D.

The defendant at the instance of the plaintiff placed his, the defendant's, farm in his hands for sale, subject to the payment of a certain commission in case the farm should be disposed of through him, and if the defendant himself sold without the aid of the plaintiff, the commission

AGENT.

560.

COMMISSION, 560.

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should be only one-half. The defendant alleged that it was a term of the arrangement that if the land remained unsold at the end of two years the agreement should cease:—Held, that if parol evidence as to the limitation of time, was inadmissible, the law would infer its continuance for a reasonable time only and that in deciding what was a reasonable time the time spoken of by the parties which was two years, might be considered. Per Burton and Patterson, J.J.A., such parol evidence was admissible:—Held, also, that the defendant having refused to sell to a proposed purchaser found by the plaintiff, the plaintiff was not entitled to recover his full commission on a sale, but the value of his services as on a quantum meruit or damages for the defendant's wrongful refusal. *Adamson v. Yeager*, 10 A. R. 477.

### III. POWER AND AUTHORITY OF AGENT.

Where the principals negotiate, and either perfect a contract or put an end to proposals for one before the delegated power to their agents has been fully exercised, the acts of the principals are the binding acts, and the subsequent acts of the agents are of no avail as against their principals. In this case, upon the letters and evidence, set out in the report, it was held that the defendant had not withdrawn his prior proposals and abandoned the negotiations before a final arrangement had been come to by the respective solicitors. *Fardon v. Fardon*, 6 O. R. 419.—Chy. D.

C. R. S. being the owner of certain leasehold property, wrote E. E. K., a land agent a letter in these words, "Please call on J. J. R. He keeps a small shop \* \*. He resides in my house on P. Street, and has been wanting to purchase it for some time. Tell him if he gives me \$235, cash at once I will send the papers to you for him, and he can pay over the money to you. Please write me by return mail." On the following day E. E. K., wrote to J. J. R. as follows: "Mr. S. of Meaford wishes me to say that if you desire to purchase some property he owns on P. Street, that if you give him \$235 cash he will send the deeds to me and deliver them to you. Your early reply will very much oblige." About a month after an acceptance was endorsed on the latter letter in these words, "I hereby accept the above on the understanding that I pay expenses," and it was signed by J. J. R. Upon an action being brought for specific performance by J. J. R., against C. R. S. It was held, that the letter from C. R. S. did not contain authority to E. E. K., to enter into a contract for the sale of the property. *Ryan v. King*, 7 O. R. 266.—Ferguson.

Where one brought an action against the registered owners of a certain vessel for the value of goods supplied before they became such owners, not on the order of the defendants, but on the order of one G. C., between whom and the defendants no relation of agency was proved:—Held, that the plaintiff could not recover:—Held, also, that it was open to the defendants to shew that their real interest was that of mortgagees, though ostensibly registered owners. The fact that the vessel got the benefit of the supplies and necessaries did not make the registered owner liable. *Nelson v. Wigle et al.*, 8 O. R. 82.—Boyd.

A bank manager is not acting without the scope of his authority in accepting the cheque of a customer to deliver to another customer on a particular day, or on the happening of a specified event. *Grieve v. The Molsons Bank*, 8 O. R. 162.—C. P. D.

Payment of mortgage money to solicitor. See *Gillen v. The Roman Catholic Episcopal Corporation of the Diocese of Kingston in Canada, et al.*, 7 O. R. 146, p. 433; *McMullen v. Polley*, 12 O. R. 702, p. 433.

See *Dobell et al. v. Ontario Bank et al.*, 9 A. R. 484, p. 300.

### IV. LIABILITY OF PRINCIPAL FOR ACTS OF AGENT.

The plaintiff during his initiation as a member of the defendants' lodge, in the presence of the principal officers and a number of members, constituting a full and perfect meeting, was injured through the rough usage of some of the members. It appeared that this and other proceedings were taken with the knowledge of all those who were present, and that somewhat similar proceedings had happened on the occasion of other initiations, and that they were allowed and not checked:—Held, that they must be taken to have been done with the consent of the corporate body, and that the defendants were liable in damages for the injuries sustained. *Kinver v. The Phoenix Lodge I. O. O. F.*, 7 O. R. 377.—Q. B. D.

### V. LIABILITY OF AGENT TO PRINCIPAL.

Sale to agent of land bought by him in contemplation of a sale at an advanced price to parties whom he misrepresented to the principals as having withdrawn from the position of purchasers. See *Walmsey v. Griffith et al.*, 10 A. R. 327.

An agent employed to purchase lands is not authorized to purchase lands which are subject to mortgage. Where, however, the principal was made aware of the incumbrance and still agreed to accept two lots out of ten lots alleged by the agent to have been bought for himself and his principal, this was deemed a waiver of the objection to the act of the agent and to the right of the principal to demand a return of the money placed in his agent's hands. But the principal having ascertained that the two lots offered to him fell short in quantity, of which fact the agent was aware when offering them:—Held, under these circumstances, that the principal's right of action revived and that he was entitled to enforce payment from the agent of the principal money and interest. *Butterworth v. Shannon*, 11 A. R. 86.

### VI. RIGHT OF PRINCIPAL TO CONTRACT MADE BY AGENT.

W. signed and sealed a deed of conveyance of certain land to C., who supposed him to be the owner of the land, as he professed himself to be, whereas he was really only acting as agent for M. the owner. M. now brought this action against C. for specific performance of, as he alleged, a contract on C.'s part to purchase the

land. There was no note or memorandum of the alleged contract, other than the said deed, which was signed and sealed by C., and was in the ordinary short form, and acknowledged the receipt and payment of the purchase money, though the evidence shewed that only 10 per cent. of it had been actually paid. It did not appear that the deed had ever been delivered:—Held, that the deed, though incomplete as a conveyance, was evidence of a contract of sale, sufficient to satisfy the Statute of Frauds:—Held, also, that though W. professed at the time of the contract to be the owner of the land, yet, as in reality he was acting as agent for M., M. could avail himself of the contract, and was entitled to judgment. *McCarthy v. Cooper et al.*, 8 O. R. 316.—Ferguson. Affirmed, 12 A. R. 284.

See *Walmley v. Griffith et al.*, 10 A. R. 327, p. 656.

#### VII. MISCELLANEOUS CASES.

Power of Toronto agent to change destination of goods or vary the terms of a bill of lading placed in the hands of an agent of a forwarding company at Waterford, Ont., for carriage to Liverpool. See *Monteith v. The Merchants Express Co.*, 9 A. R. 282.

Purchase of mortgaged premises sold under power of sale by agent of mortgagee. See *Ingalls v. McLaurin*, 11 O. R. 380.

Power of municipality to act as agent for a railway in the construction of a subway crossing the track of the railway. See *West v. The Corporation of the Village of Parkdale; Carroll et al. v. The Same Defendants*, 12 A. R. 393.

The plaintiff, as assignee of an insolvent estate, claimed from the defendant, a creditor of the estate, an account as to his dealings with timber limits assigned to him as security, and payment of any balance. Part of the timber had been placed in the hands of K. & Co. for sale:—Held, upon the facts stated, affirming the decision of Ferguson, J., that the defendant was not liable for a loss occasioned by K. & Co.'s failure to pay over part of the price of the timber sold by them. *Bell v. Fraser*, 12 A. R. 1.

### PRINCIPAL AND SURETY.

#### I. LIABILITY OF SURETY, 564.

##### II. RELEASE OF SURETY.

###### 1. *Course of Dealing*, 565.

###### 2. *Time given to Principal*.

(a) *On Bills or Notes*—See **BILLS OF EXCHANGE AND PROMISSORY NOTES**.

###### 3. *Laches or Neglect of Oblige*, 566.

###### 4. *Death of Surety*, 567.

#### III. RIGHTS OF SURETY ON ASSIGNMENT OF JUDGMENT AGAINST PRINCIPAL, 567.

#### IV. ACTIONS AGAINST SURETY.

##### 1. *Pleading*, 567.

#### V. GUARANTEE—See **GUARANTEE AND INDEMNITY**.

#### I. LIABILITY OF SURETY.

The defendant M. was appointed an inspector under the General Inspection Act, 1874, 37 Viet. c. 45 (Dom.) By s. 6 each inspector and deputy inspector is required to give security by bond to the Crown for the due performance of the duties of his office, and such bond shall avail to the Crown and to all persons aggrieved by any breach of the conditions thereof. By s. 7 the inspectors are to appoint the deputy inspectors, who are to be the deputies of the inspector for all the duties of his office, and their official acts shall be held to be his acts, and he is to be responsible therefor as if done by himself. A bond was given by the inspector, and the other defendants, as sureties for the faithful discharge of the duties of the said office, and for duly accounting for all moneys and property. A similar bond was given by the deputy inspector. The deputy-inspector made a faulty inspection, and the plaintiffs purchased, relying thereon, and were damaged:—Held, under the statute and the bond given thereunder, the inspector M.'s sureties were liable for the default of the deputy: and that the fact of the plaintiff having a remedy also on the deputy-inspector's bond was no answer to the claim against M.'s sureties:—Held, also, that the plaintiffs were "persons aggrieved" within the meaning of the statute:—Quære, whether the defendants were entitled to notice of action, but the question was not decided, as want of notice was not pleaded. Sec. 11 provided that disputes between the inspector and the deputy-inspectors and owners, &c., of articles inspected through or relating in any respect to the same, were to be settled by the board of trade, or where there was no such board, by certain specified persons:—Held, that the claim in this action was not a dispute within this section. *Verratt v. McAulay et al.*, 5 O. R. 313.—C. P. D.

Held, that where an official assignee in insolvency had given a bond as such with sureties, pursuant to the Insolvent Act of 1875, and amending Acts, and the creditors had duly appointed the same individual to be creditors' assignee, under section 29 of that Act, but had not required him to give security as such creditors' assignee, the sureties under the bond given by him as official assignee remained liable for his dealings with the estate, and were not discharged by reason of such appointment as creditors' assignee. *Armstrong v. Forster et al.*, 6 O. R. 129.—Proudfoot.

Semble, that one who brings an action against an official assignee in insolvency for default in dealing with a certain estate, upon his bond given as security against such defaults, is not bound to ascertain if the assignee is in default as to other estates; and the sureties to the bond are discharged by payment to any one who recovers judgment against them. *Id.*

The bond contained a stipulation that in the event of any sum being found due by M. to the bank interest should be payable thereon from the time an account of the balance due was delivered to the parties to the bond by the bank, and judgment was given in the court below in excess of the penalty:—Held, however, as the law would not allow a verdict against the obligors for a greater sum than the penalty, interest could not be computed on that amount until after judgment. *Exchange Bank v. Springer et al.; Exchange Bank v. Barnes et al.*, 13 A. R. 390.



## SURETY.

appointed an inspector under Act, 1874, 37 Viet. The inspector and deputy inspector by bond to the performance of the duties shall avail to the plaintiff if they are relieved by any breach of s. 7 the inspectors. The inspectors, who are to be responsible for all the duties shall be held responsible therefor. A bond was given by the defendants, as sureties, of the duties of the plaintiff for all moneys advanced and was given by the deputy-inspector made plaintiffs purchased, and damaged:—Held, that the fact of the plaintiff being liable for the fact of the deputy-inspector to the claim, also, that the plaintiff was within the meaning of the defendants' action, but the question of notice was not at dispute between the inspectors and own through or relating were to be settled by the fact there was no such persons:—Held, that not a dispute within *Atlay et al.*, 5 O. R.

al assignee in insolvent such with sureties, of 1875, and amended had duly appointed creditors' assignee, but had not required creditors' assignee, and given by him as liable for his dealings discharged by reason of creditors' assignee. *Armstrong et al.*, 129—Proudfoot.

an action against a plaintiff for default in dealing with his bond given as surety, is not bound to the bond as to other one who recovers the bond. *Boyd et al.*, 9 O. R. 580.

See *The Corporation of the Municipality of the Township of Adjala v. McElroy et al.*, 9 O. R. 580, *infra*.

## II. RELEASE OF SURETY.

## 1. Course of Dealing.

The defendant, at the instance of F., the plaintiff's manager, endorsed the note of C., to secure an advance to the latter on grain. It was represented to defendant by F. that the giving of his name was a mere formal matter; that only seventy-five per cent. of the value of the grain would be advanced; that warehouse receipts would be taken, and that he (F.) would from time to time see that the grain was in store, and would hold it in security for the money advanced, crediting the proceeds of any sales upon the note in question. The defendant was subsequently induced, by the representation of F., as the jury found, that it would not alter his position to sign a guaranty under seal, which, though not intended, as F. stated, to vary the defendants' original liability, as a matter of fact did so, by permitting the plaintiffs to release or abandon their security upon the grain, upon the faith of which defendant became liable as endorser:—Held, that the guaranty was void as against the defendant; and that it was not necessary to prove that the bank manager knew, when he made it, that his representation was false: nor was it an answer that the defendant could have examined the deed for himself, as he was entitled to rely upon the representation of the bank's agent. *Molsons Bank v. Turley*, 8 O. R. 293—Q. B. D.

A treasurer was appointed by the plaintiffs under R. S. O., c. 174, by s. 274, of which all officers appointed by a council, shall hold office until removed by such council. He furnished a bond dated the 1st of November, 1880, conditioned that if he should "well and truly discharge the duties of township treasurer so long as he shall remain in the said office, and shall render true and just accounts of all moneys, &c., as shall come and have come into his hands during his continuance in said office, and he had the same promptly into the hands of his successor in office, then, &c." He was re-appointed annually for several years:—Held, the re-appointments were not equivalent to removals and re-appointments, but were rather a retention in office of the same treasurer, and that the sureties were not in consequence thereof discharged. To determine a man's office as treasurer under the statute, there should be some positive act of removal by which he is displaced and another appointed, or by which the office, though continued in the same person, becomes different in some material point. Mere implication arising from formal re-appointment should not be deemed equivalent to such act of removal. *The Corporation of the Municipality of the Township of Adjala v. McElroy et al.*, 9 O. R. 580.—Boyd.

The treasurer having failed to account for large sums, the council of the plaintiffs caused a letter to be written to him on the 27th of February, 1882, requiring him to settle all claims by a certain day, otherwise a special meeting would be called to consider his case. He failed to settle, and the council did not carry out their threat. In 1883 the council again becoming dissatisfied with the treasurer, passed a resolution that no further

payment should be made to him, but that all moneys should be paid into a certain bank. In 1884, the council for that year rescinded this resolution and permitted the treasurer to receive the accumulated funds. No notice of any kind was given to the sureties:—Held, that the plaintiffs had failed to perform their duty by retaining the treasurer in office after they had become aware of his defalcations and continued default; and that their failure to do so was a breach of duty towards the sureties, which released the latter from all liability after the 27th of February, 1882. A reference was granted to the plaintiff's election to take an account of the amount due under the bond to that date, and in default of such election, the action was dismissed, with costs. *Id.*

K. & Co. were customers of the plaintiffs and gradually accumulated a liability of about \$26,000, to secure which the defendants gave a mortgage containing a recital that the plaintiffs had agreed to make further advances to K. & Co. on receiving security for the then present indebtedness, and a redemption clause providing for payment of all bills, notes, and paper upon which K. & Co. were then liable, together with all substitutions and alterations thereof and all indebtedness in respect thereof, the same being a continuing security. The bank did business with K. & Co. in two different ways, one by discounting K. & Co.'s customers' notes, in which case their rule was to notify the customers that they held their notes, and another by discounting K. & Co.'s own notes and taking their customers' notes as collateral, in which case they always got the collateral notes to an amount exceeding the advance, but did not notify the customers. At the time the mortgage was given all the notes held by the bank were believed to be genuine, and the discount of the customers' paper very largely exceeded the discount of K. & Co.'s notes. K. & Co. suspended two years later. At the time of the suspension it was discovered that by renewals and substitutions nearly all the notes at the date of the mortgage had been replaced by K. & Co., in renewals and substitutions by forgeries, and that the amount of the discounts of K. & Co.'s notes secured by the collaterals very largely exceeded the discounts of the customers' notes. In an action by the bank to foreclose the mortgage, the mortgagors claimed that they, as sureties, were discharged by the bank's action:—Held, that the bank parted with genuine and received fabricated securities, and through its laches or default necessarily worked prejudice upon the rights of the sureties; that of two innocent parties of whom one must suffer on account of the fraud or crime of a third, the one most to blame by enabling the wrong to be committed should bear the loss, and the defendants were exonerated from liability in so far as they were prejudiced by the conduct of the bank. *Prima facie* the bank were liable to the extent of the face value of the securities surrendered, but they were at liberty to reduce such amount by evidence as they might be advised. *The Merchants Bank of Canada v. McKay et al.*, 12 O. R. 498—Chy. D.

See *Boulton et al. v. Blake*, 12 O. R. 532, p. 400.

## 3. Laches or Neglect of Oblige.

In an action against the sureties under a bond guaranteeing the honesty of one M. as cashier of

the plaintiffs' bank, charging misappropriation of funds by M., the defendants set up, as a bar to recovery, neglect of the directors of the bank in not examining the books, so as to detect any malversation on M.'s part:—Held, that to sustain this defence the sureties must shew connivance between the plaintiffs and M., or a very strong case of negligence, which they had not done in the present case. The chief reliance of the surety, in such a case, ought to be, in the honesty of the man whose honesty he has guaranteed. *Exchange Bank of Canada v. Springer et al.*—*Exchange Bank of Canada v. Barnes et al.* 7 O. R. 309.—Ferguson. Affirmed on appeal, 13 A. R. 390.

See *The Corporation of the Municipality of the Township of Adajala v. McElroy et al.*, 9 O. R. 580, p. 566; *The Merchants Bank of Canada v. McKay et al.*, 12 O. R. 498, p. 566.

#### 4. Death of Surety.

The fact that the knowledge of the death of a surety had reached the officers of the bank formed no ground for relieving his estate from liability upon the bond. *Exchange Bank of Canada v. Springer et al.*; *Exchange Bank of Canada v. Barnes et al.*, 13 A. R. 390; 7 O. R. 309.

#### III. RIGHTS OF SURETY ON ASSIGNMENT OF JUDGMENT AGAINST PRINCIPAL.

Where one brought action against a maker of a note and an endorser thereon, and recovered judgment, with costs, which the endorser paid and took an assignment of the judgment:—Held, that the latter was entitled under R. S. O. c. 116, s. 3, to recover from the principal debtor the whole of the judgment, including the costs. *Harper v. Culbert et al.*, 5 O. R. 152.—Ferguson.

Judgment for a debt was obtained by the plaintiffs against the defendants, who stood towards one another in the relation of principal and surety. The surety paid the plaintiffs the amount of their debt and costs, took an assignment of the judgment, and then proceeded to enforce it against his principal:—Held, that the costs as well as the debt were recoverable by the surety, as against his principal. *Victoria Mutual v. Freeb*, 10 P. R. 45.—Dalton, Master.

#### IV. ACTIONS AGAINST SURETY.

##### 1. Pleading.

An action against the defendant on his bond as surety for H. & McT. for the amount due the plaintiff by H. & McT. on their banking account with the plaintiffs. Counter-claim by the defendant against the plaintiff and H. & McT., alleging that the defendant is liable only as such surety, and that the plaintiff ought to resort to H. & McT. to enforce payment from them, and that H. & McT. should be ordered to pay the amount, and indemnify the defendant. As the counter-claim was not rested upon any particular agreement, but was set up as arising from the position of the parties as creditors, principal debtor, and surety, it was held bad, and ordered to be struck out. *Federal Bank v. Harrison*, 10 P. R. 271.—Dalton, Master—Rose.

#### PRINTING.

Parliamentary contract. See *Regina v. MacLean*, 8 S. C. R. 210, p. 527.

#### PRIORITY.

- I. OF EXECUTIONS—See EXECUTION.
- II. EFFECT OF REGISTRATION—See REGISTRY LAWS.

#### PRISONER.

See HABEAS CORPUS.

#### PRIVILEGED COMMUNICATIONS.

See DEFAMATION—EVIDENCE.

#### PRIVY COUNCIL APPEALS.

An action against the sureties upon a bond given by the defendants in the action of *McLaren v. Canada Central R. W. Co.*, upon the appeal of the defendants to the Court of Appeal in that cause. The defendants in *McLaren v. Canada Central*, appealed from the Court of Appeal to Her Majesty in Council, and in that appeal security had been given and allowed, including security for the whole amount recovered, and execution had been stayed in consequence:—Held, that proceedings must also be stayed in this action. *McLaren v. Stephens*, 10 P. R. 88.—Dalton, Master.

#### PROBATE.

See EXECUTORS AND ADMINISTRATORS.

#### PROCHEIN AMY.

See HUSBAND AND WIFE—INFANT.

#### PRODUCTION OF DOCUMENTS.

See EVIDENCE.

#### PROHIBITION.

To JUDGES OF DIVISION COURT—See DIVISION COURTS.

To Minister of Agriculture to restrain enquiry under the Patent Act, 1872. See *In re Bell Telephone Company and the Telephone Manufacturing Company and the Minister of Agriculture*, 7 O. R. 605.

Upon proceedings being taken in the Division Court, in an action in which that court has no jurisdiction, the defendant is entitled to prohibition immediately upon the action being brought.

See *Regina v. Mac.*

EXECUTION.  
ION—See *REGISTRY*

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UNICATIONS.  
EVIDENCE.

APPEALS.

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n the action of Mc-  
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COURT—See *DIVISION*

to restrain enquiry  
See *In re Bell Tel-  
phone Manufacturing  
of Agriculture*, 7 O.

taken in the Division  
that court has not  
is entitled to prohibi-  
action being brought,

and the fact of no notice of statutory defence be-  
ing given under sec. 92 R. S. O. c. 47, does not  
affect the defendant's right to prohibition. *In re  
Summerfeldt v. Worts*, 12 O. R. 48.—Q. B. D.

Held, reversing the judgment of Proudfoot,  
J., 9 O. R. 274, that the status of C., as a per-  
son, or the assignee of a person, who registered  
a plan, was a question of law and fact combined  
for the county judge to determine upon C.'s ap-  
plication to him, under R. S. O. c. 111, s. 84, to  
amend the plan, and that his decision was not  
examinable in prohibition. *In re Chisholm and  
The Corporation of the Town of Oakville*, 12 A.  
R. 225.

Where a defendant, upon being sued in the  
First Division Court in the county of Middlesex,  
filed a notice disputing the jurisdiction and served  
a notice of motion returnable before a judge in  
chambers for an order directing the issue of a  
writ of prohibition to the said Division Court, to  
prohibit the judge thereof and the plaintiff from  
proceeding with the suit in that Division Court  
on the ground of want of jurisdiction in that court  
to hear and determine the same, but did not en-  
title his notice of motion, nor the affidavit filed  
in support of the motion, in any division of the  
High Court of Justice:—Held, affirming the or-  
der of O'Connor, J., in chambers, granting the  
writ, not a fatal objection, but one which could  
and should be amended under Rule 474, O. J.  
Act. Held, also, that, although before the motion  
for prohibition came on to be heard the plaintiff  
in the Division Court caused the plaintiff to be  
transferred to the proper Division Court in the  
county of Lambton, nevertheless the defendant,  
upon being sued in a wrong Division Court, had  
the right to apply for prohibition, and the judge  
in chambers having in his discretion given the  
defendant the costs of the motion of prohibition,  
that discretion could not be interfered with. *Re  
Olmstead v. Errington*, 11 P. R. 366.—Q. B. D.

To restrain partition proceedings. See *Murcar  
et al. v. Bolton et al.*, 5 O. R. 164, p. 506.

#### PROMISSORY NOTES.

See *BILLS OF EXCHANGE AND PROMISSORY NOTES.*

#### PROSTITUTE.

See *BAWDY HOUSE.*

#### PROTEST.

I. OF *BILLS OR NOTES*—See *BILLS OF EX-  
CHANGE AND PROMISSORY NOTES.*

II. *PAYMENT OF MONEY UNDER PROTEST*—See  
*PAYMENT.*

#### PROVINCIAL SECRETARY.

Mandamus to Provincial Secretary requiring  
publication of notice of increase of a Manufac-  
turing Company's capital stock. See *Re Massey  
Manufacturing Company*, 11 O. R. 444.

#### PUBLIC COMPANY.

See *CORPORATIONS.*

#### PUBLIC HEALTH.

In December, 1884, B. was by by-law appoint-  
ed health officer of the township of Seymour,  
but the by-law did not fix any salary as might  
have been done under 47 Vict. c. 38 s. 20 (Ont.):  
—Held, on action brought by B. for remunera-  
tion, that the law would fix the salary at a rea-  
sonable sum, regard being had to the services  
performed, and to be performed by the plaintiff.  
*Bogart v. The Corporation of the Township of  
Seymour*, 10 O. R. 322.—Ferguson.

Where B. brought action against the township  
of S. to recover remuneration for medical ser-  
vices performed on the instructions of the cor-  
poration and of the board of health, and it was  
objected that the by-law professing to appoint  
the board of health was invalid by reason of the  
fact that it merely purported to appoint three  
persons to be a board of health, but did not  
make any mention of the officers who, by 47  
Vict. c. 38 s. 12 sub-s. 2, are made ex officio  
members of the board of health, and because it  
did not specifically state the three individuals  
named to be ratepayers:—Held, that looking  
at the provisions of the said statute, and con-  
sidering that the attack now made upon the by-  
law was not by motion to quash it or of a like  
character, the objections could not be allowed to  
prevail. *Id.*

Injunction granted to restrain a municipality  
from erecting a smallpox hospital within another  
municipality. See *The Corporation of the Town-  
ship of Elizabethtown et al. v. The Corporation of  
the Town of Brockville*, 10 O. R. 372, p. 328.

See *In re Workman and The Corporation of  
the Town of Lindsay*, 7 O. R. 425, p. 455.

#### PUBLIC OFFICER.

I. *GENERALLY*—See *OFFICE.*

II. *NOTICE OF ACTION TO*.—See *ACTION.*

#### PUBLIC SCHOOLS.

Where a school trustee, who was a medical  
practitioner, acted in his professional capacity  
under engagement by the board for examining  
the pupils attending the school as to the pre-  
valence of an infectious disease, and made a  
charge of \$15 therefor, which the board ordered  
to be paid, but he afterwards declined to accept  
payment:—Held, that this disqualified him as  
trustee, and rendered his seat vacant, under 44  
Vict. c. 30, s. 13, (Ont). *Regina ex rel Stewart v.  
Standish*, 6 O. R. 408.—C. P. D.

A new rural school section being formed, it  
became necessary for the then trustees to provide  
a school site, &c. A public meeting of the rate-  
payers was called pursuant to 48 Vict. c. 49, s.  
64 (Ont.), which nearly all the ratepayers at-  
tended, when the T. site was chosen by a major-  
ity vote of both the ratepayers and trustees as  
against the J. C. site. A complaint against this

result was lodged with the school inspector under sec. 32 of the statute, which led to his making attempts to have an amicable adjustment of the difficulty, the outcome of which was that two of the trustees gave notice of a subsequent meeting for the purpose of changing and selecting a school site, at which meeting a unanimous vote was had in favour of a third site, called the C. site. In an action by the other trustee and some ratepayers to have it declared that the last meeting was illegal, and to restrain building on the C. site, in which it appeared that fifty out of the sixty-seven ratepayers approved of the latter site, it was:—Held, that the necessary pre-requisite, under sec. 64 of the statute, of taking the opinion of the ratepayers had been complied with, and the selection made was the T. site: that no change of a school site should be made without the consent of the majority of ratepayers present at a special meeting called for that purpose, and that under the circumstances of this case the school site had been ascertained and fixed by the first meeting, but it was competent for the second meeting to change the site with the consent of the necessary majority. *Wallace et al. v. The Board of Public School Trustees for Union School Section Number Nine of the Township of Lobo, in the County of Middlesex, et al.*, 11 O. R. 648.—Boyd.

The whole tendency of recent amendments of the Education Acts has been to give the rural school sections greater powers of self-regulation and self-government, and the courts should not be astute to interfere unless there has been a plain violation of the statute, or a manifest usurpation of jurisdiction, or a reckless disregard of individual rights. The action was therefore dismissed, but without costs, as it was a new point and the statute was not plainly expressed. *Ib.*

A mandamus to compel the admission of a child to a public school will not be granted where it is shewn that there is not accommodation for her, for this is a valid answer to such an application, especially where it appears, as here, that there is sufficient accommodation at another public school in the same town; nor where it is shewn that the application for admission was not made in the regular and proper way, under the Public School Regulations, as was the case here, inasmuch as, although the child in question was a registered pupil at the other public school in the same town during the preceding term, she had not attended there at the commencement of the present one, nor had application been made to the inspector to have her admitted to the school to which admission was now sought. *Dunn v. The Board of Education of the Town of Windsor*, 6 O. R. 125.—Ferguson.

On the 3rd of December, 1884, a school teacher dismissed the plaintiff, a boy thirteen years of age, for disobedience, speaking impudently when questioned about it, and refusing to be punished for misconduct. The matter was brought before the trustees, and on the 6th January they held a meeting and passed a resolution that the boy could return to school on his expressing regret for his misconduct. After the receipt of a solicitor's letter on behalf of the father, the trustees, on the 10th February, held another meeting and passed a resolution that the boy could return to school after one day's suspension. On the 11th February another meeting of the trustees was

held and a resolution passed reinstating the resolution of the 6th January. The father was not notified nor was he present at the meetings of the 6th January and 11th February; but he was notified of, and was present at, the meeting of the 10th February. The boy returned to school, but, relying on the resolution of the 10th February, made no apology, and remained there for several days, but was not interfered with by the teacher, who, however, would give him no instruction. In an action in the Division Court against the teacher and trustees for an alleged wrongful dismissal, the learned judge dismissed the case against the teacher, but held the trustees liable:—Held, that the action must be dismissed against the trustees: that it was not their act, but that of the teacher, that caused the boy's removal: that the passing of the resolution as to apologising was not an expulsion: that the teacher in not instructing the boy was not acting under the trustees' direction; and that they were not liable for not compelling her to give the instruction. *In re the Minister of Education—McIntyre v. The Public School Trustees of Section Eight in the Township of Blanchard et al.*, 11 O. R. 439.—C. P. D.

Quare, whether in such a case as this malice must not be shewn, unless followed by some act amounting to assault or trespass; and whether a mandamus, and not an action, was not the proper remedy. *Ib.*

The action of the trustees in proceeding in the absence and without notice to the parties interested, and also the unreasonable conduct of the father, commented on. *Ib.*

Per Ritchie, C.J.—That the town of Dartmouth is not, but that the city of Halifax is, exempted by c. 32 R. S. N. S. from contribution to the county school rates. *The Queen v. Warden and Council of the Town of Dartmouth*, 9 S. C. R. 509.

## PUBLIC WORKS.

Expropriation of roads for public works. See *Re Trent Valley Canal*, "*Re Water Street*," and "*The Road to the Wharf*," 11 O. R. 687.

## PUBLICATION.

EVIDENCE OF.—See DEFAMATION.

Injunction to restrain use of trade name. See *Gage v. Canada Publishing Co.*, 11 A. R. 402.

## QUALIFICATION.

Members of municipal councils. See *Regina ex rel. Felitz v. Howland*, 11 P. R. 264, p. 447.

Of voters in unorganized townships. See *Muskoaka and Parry Sound Election (Ont.)—Paget et al. v. Fauquier*, 1 E. C. 197, p. 482.

Disqualification as voter at parliamentary elections. See *Srigley v. Taylor*, 6 O. R. 108, p. 482.

Disqualification as school trustee. See *Regina ex rel. Stewart v. Standish*, 6 O. R. 408, p. 570.

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6 O. R. 108, p. 482.

trustee. See *Regina*  
6 O. R. 408, p. 570.

## QUAKERS.

See *Dorland v. Jones*, 12 A. R. 543, p. 80.

## QUASHING.

I. CONVICTIONS—See INTOXICATING LIQUORS  
—JUSTICES OF THE PEACE.

II. BY-LAWS—See MUNICIPAL CORPORATIONS.

## QUEBEC.

See INTERNATIONAL LAW.

## QUIETING TITLES ACT.

Quere, whether an order made by the referee  
of titles barring the claims of an infant heir at  
law would have the effect of divesting the estate  
of the infant. *Re Shaver*, 6 O. R. 312.—Boyd.

## QUO WARRANTO.

See MUNICIPAL CORPORATIONS.

## RAILWAYS AND RAILWAY COMPANIES.

### I. LANDS AND THEIR VALUATION.

1. *Lands Taken*, 574.
2. *Lands Injuriouslly Affected*, 574.
3. *Lands Granted on Condition*, 575.
4. *Compensation*, 576.
5. *Order for Immediate Possession*, 577.
6. *Reference and Award*, 577.

### II. CONSTRUCTION OF RAILWAYS.

1. *Bridges and Subways*, 580.
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## I. LANDS AND THEIR VALUATION.

### 1. *Lands Taken.*

The owner of land taken by a railway, is entitled to compensation; and the company must proceed to settle the amount thereof, under R. S. O. c. 165, s. 20; if they do not the proper course is to apply for a mandamus. *Demorest v. The Mulland R. W. Co. of Canada et al.*, 10 P. R. 73.—Cameron.

On such application a formal title in the absence of proof to the contrary, need not be proved; it is sufficient if the applicant swear that he is the owner of the land taken. *Ib.*

The defendants having, in 1872, filed their plan and book of reference under the Railway Act, shewing their terminus at a certain point, and having built and used their line up to that point, desired in 1885 to extend their line about one-third of a mile further on, and took proceedings to expropriate certain land required for that purpose, and possession having been refused applied to a county judge for an order for immediate possession. On an application for an injunction to restrain the company from proceeding before the judge on the ground that no new plan and book of reference shewing the land required had been filed, and in which the company contended that none were necessary, as they were within the limits of the deviation of one mile provided for by the statute. It was:—Held, that "deviation" is a term not to be restricted to a lateral variance on either side of the line, but may mean a change de viâ in any direction within the prescribed limits, whether at right angles to or deflecting from or extending beyond the line. *Murphy v. The Kingston and Pembroke R. W. Co.*, 11 O. R. 302.—Boyd.

A railway company after the completion of its line, sought to expropriate a piece of land not marked or referred to on any map or plan filed, or book of reference made by the company, but within one mile's distance of the terminus of the railway as delineated on the filed plan, for the purpose of better utilizing a certain other property previously acquired by them as a passenger and freight station:—Held, that, under 42 Vict. c. 9, s. 8, sub-s. 11, (Dom.) this was not permissible, there being no provisions affecting the matter in the special Acts of the company. *Murphy v. The Kingston and Pembroke R. W. Co.*, 11 O. R. 582.—Boyd.

Held, also, that 46 Vict. c. 64, (Dom.), which empowered the company to hold and own land in any municipality through or in which the main line or any branch was carried for the erection and maintenance thereon of stations, sidings, &c., as might be necessary for the purposes of the company, did not empower them to expropriate against the will of the owner. *Ib.*

See *Re Watson v. The Northern R. W. Co.*, 5 O. R. 550, p. 591.

### 2. *Lands Injuriouslly Affected.*

The plaintiff in his statement of claim claimed damages from the defendants for "unlawfully, negligently and wrongfully" depressing certain streets in a town and thereby making it inconvenient and almost impossible for persons to

approach the plaintiff's store for business; also for, in like manner, blocking them up and rendering them almost impassable in the neighbourhood of the plaintiff's store, and thereby "negligently, unlawfully, and wrongfully," preventing customers or others coming thereto, and almost entirely destroying the plaintiff's business. The statement further claimed that if the depressing and blocking up should be found to be lawful, a mandamus should be granted requiring the defendants to proceed to arbitrate to ascertain the compensation payable to plaintiff; or that it be referred to the proper officer to ascertain and state such compensation:—Held, on demurrer, that the statement of claim was sufficient: for it alleged that the work was negligently done, and this gave a cause of action, even though the work itself might be lawful. *Quillman et al. v. The Canada Southern R. W. Co. et al.*, 6 O. R. 567.—Rose.

Quere, whether a mandamus would be granted; for if the plaintiff was entitled to compensation the proper remedy would apparently be by reference to the proper officer, as asked by way of alternative relief, also whether it is necessary to allege that defendants railway touches or takes a portion of plaintiff's land; and whether also, under the Railway Acts, defendants are liable to make compensation except for lands taken. As to the latter points, as the judgment could not be reviewed until after the trial, they were enlarged before the judge thereat. *Id.*

### 3. Lands Granted on Condition.

When the defendants, the Canada Southern Railway Company were locating their road, an agent was employed by them for the purpose of obtaining the right of way from the several land owners along their line of road, and amongst others the agent purchased such right of way across the plaintiff's farm for a sum which the plaintiff swore was much less than he would have accepted therefor, in consequence of the agent agreeing that a certain crossing underneath the railway where trestle work was to be constructed, should be continued permanently. Several years afterwards the company desiring to make an alteration in the construction of the road by substituting a solid earth embankment for the trestle work, proceeded to effect such alteration, when the plaintiff instituted proceedings to restrain the company from destroying or interfering with the crossing:—Held, (varying the judgment of Proudfoot, J., 4 O. R. 28), that the plaintiff was not entitled to such crossing in perpetuity, but that under the circumstances there should be a new valuation of the lands conveyed to the company, and if the parties could not agree on the amount or the mode of ascertaining it, a reference for the purpose should be made to the Master. *Clouse v. The Canada Southern R. W. Co.*, 11 A. R. 287.

The agent of a railway company while engaged in obtaining the right of way agreed with one S., through whom the plaintiff claimed, for the right of crossing his property, and S. executed an agreement to convey to the company four acres and seventeen hundredths of an acre of his farm for that purpose in consideration of \$1,650; such agreement before being executed having had indorsed thereon a memorandum that S. should "have liberty to remove for his own

use all buildings on the said right of way; and it is also further agreed that in the event of there being constructed on the same lot a trestle bridge of sufficient height to allow of the passage of cattle, the said company will so construct their fence to each side thereof, as not to impede the passage thereunder." The company did construct a trestle bridge which the plaintiff as well as S. whilst owner of the lot continued to use, for the purpose of passing under the railway from one portion of the farm to another for upwards of ten years, when the company determined to convert the trestle bridge into a solid embankment:—Held, that the company were at liberty so to change the bridge, but that the plaintiff was, as in *Clouse v. The Canada Southern R. W. Co.* (11 A. R. 287,) entitled to a re-valuation of the land conveyed. Burton, J. A., dissenting, who thought the plaintiff had under the circumstances failed to establish any claim for relief. *Erwin v. The Canada Southern R. W. Co.*, 11 A. R. 306.

### 4. Compensation.

The right of a railway company to cut down trees for six rods on each side of the railway under the Consolidated Railway Act, 1879, s. 7, sub-s. 14, is entirely distinct from their right to expropriate land for the road. If compensation can be claimed for it, it must be distinctly demanded by the notice:—Held, therefore, that an award was bad in allowing compensation to the owner of lands expropriated for the damage that might accrue to the owner by the possible exercise of such right. *In re Arbitration between The Ontario and Quebec R. W. Co. and George Taylor*, 6 O. R. 338.—Cameron.

Quere, whether under the Consolidated Railway Act, 1879, more than the value of the land actually taken can be allowed, as the Act does not contain a section equivalent to s. 7 of R. S. O., c. 165, and s. 5 of C. S. C. c. 66, giving compensation for damages to lands injuriously affected. *Id.*

Seem, that where a parcel of land is severed by the railway the actual value is the difference between the value of the land of which it forms part before the expropriation, and the value to the owner of the remainder after the expropriation. *Id.*

Held, that the possible damages to bush land from greater exposure to winds and storms, and the greater liability to injury by fire by reason of the working of the railway, were contingencies too remote to be considered in estimating the amount of compensation where there were no buildings to be endangered. *Id.*

The notice by the railway company included compensation "for such damages as you may sustain by reason or in consequence of the powers above mentioned":—Held, sufficient to allow the arbitrators to award damages resulting to the owner from the expropriation. *Id.*

Held, that the right of compensation for land taken by a railway company is not barred short of twenty years, and is not barred by the claimant's title to the land being extinguished by reason of the railway company having been in possession for ten years. Per ARTHUR, J., the plaintiff's claim to compensation was not money



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secured by lien, or otherwise charged on land, within s. 23 of R. S. O. c. 108, and he had not a vendor's lien, for the relation of vendor and purchaser never arose between him and the company. *Ross v. The Grand Trunk R. W. Co.*, 10 O. R. 447.—Q. B. D.

In fixing compensation to a landowner for lands expropriated by a railway, the rule is, to ascertain the value of the land of which it forms a part before the taking, and the value of such land after the taking, and deduct one from the other, the difference thus arrived at being the actual value to the owner of the part taken. Rule laid down by Cameron, C. J., in *Re arbitration between The Ontario and Quebec R. W. Co. and George Taylor*, 6 O. R., at p. 348, followed. *James v. The Ontario and Quebec Railway Co.*, 12 O. R. 624.—Ferguson.

The "taking" is properly fixed as at the date of the company giving notice to the landowner of their intention of taking the land; and it is not correct to say that the value of the lands should be taken as of a date prior to knowledge of intention to construct, or in anticipation of the construction of the railway. Interest is properly allowed to the landowner on the amount of his compensation from the time of the taking as above defined to the time of the award. 1b.

See *Bryson et al. v. The Ontario and Quebec R. W. Co.*, 8 O. R. 380, p. 309.

#### 5. Order for Immediate Possession.

Immediate possession of land, alleged to be necessary for the purposes of a railway, should not be granted to the railway on summary process under the Railway Act unless two points are very clearly established: 1st. That the company has an indisputable right to acquire the land by compulsory proceedings; and 2nd. That there is some urgent and substantial need for immediate action; and inasmuch as these points could not be said to have been clearly established by the affidavits and arguments in this present case, the court declined to interfere summarily, and dismissed the application of the railway company for a warrant to enter forthwith upon the lands:—*Quære*, as to power of judge to award costs directly under the Statute, 47 Vict. c. 11, (Dom.) *Re Kingston and Pembroke Railway Co. and Murphy*, 11 P. R. 304.—Boyd.

#### 6. Reference and Award.

The railway company served a notice on H. under 42 Vict. c. 9 (Dom.), offering a sum of money as compensation for land to be expropriated by them, and naming an arbitrator. H. served a notice on the company, naming his arbitrator, and the two appointed a third:—Held, that the notices of appointment of arbitrators and the appointment of the third arbitrator might be made a rule of court under C. L. P. Act, s. 201. *Re Credit Valley R. W. Co. v. Great Western R. W. Co.*, 4 A. R. 532, distinguished. *Herring and Napane, Tamworth, and Quebec R. W. Co.*, 5 O. R. 349.—Rose.

After the evidence had been closed the construction committee of the railway company

wrote a letter addressed to H., agreeing to certain things whereby the damage to his property would be lessened. This was delivered to the arbitrator for the company before the award was made and by him to the umpire, but was not communicated to H. until after the award, which contained recitals of the benefits proposed by this letter, and assessed the compensation at the sum originally offered by the company. The award was not signed by H.'s arbitrator, who swore that the letter affected the award, and reduced the sum awarded, while the other two arbitrators swore it had no effect upon their finding:—Held, that the award was bad. 1b.

Remarks as to the caution to be observed by arbitrators in such cases in considering or acting upon such agreements made pending the arbitration. 1b.

By sec. 9, sub-sec. 19 of the Railway Act, 42 Vict. c. 9, (Dom.), where the sum awarded by the arbitrators as compensation for land taken, and damages is not greater than that offered by the company, the costs of the arbitration shall be borne by the opposite party; but if otherwise, they shall be borne by the company; and in either case they may, if not agreed upon, be taxed by the judge. On the 2nd August, 1883, the O. and Q. R. W. Co. served P. with the statutory notice of their intention to take three and forty-two hundredths acres of P.'s land, and tendered \$3,635 as compensation therefor and for damages. This notice was abandoned and another notice given on the 23rd November, offering the same amount of money but reducing the quantity of land to one and fifty-four hundredths acres. The offer was refused and the arbitration proceeded with. The railway cut off P.'s land from the highway, and on the plan attached to the notice no crossing was shewn. The arbitrators met on the 27th December, when the company tendered a deed binding themselves to make and maintain a crossing. The arbitrators assessed the compensation and damages at \$3,516, or \$119 less than the amount tendered; but this was after taking into consideration the value to P. of the crossing:—Held, by reason of the offer to make the crossing after the arbitrators met, the tender then made was not the same as that made prior to the arbitration; and therefore the provisions of the section as to costs did not apply. A rule for a mandamus to the county judge to tax the costs to the company, and for a prohibition preventing him taxing P.'s costs, was refused:—*Quære*, whether the judge had under the circumstances any power to decide as to costs at all. *The Ontario and Quebec Railway Co. v. Philbrick*, 5 O. R. 674.—Galt.

On an arbitration with regard to land taken by a railway company, the argument closed on the 10th of August, and the arbitrators adjourned until the 11th, when, after discussion, one of them said he was sorry he could not concur with the others in the sum they had agreed upon, and withdrew. The other two then signed the award in presence of each other, and re-acknowledged it in presence of a witness on the 14th of August:—Held, that the meeting having been adjourned to the 11th the case was within the terms of 42 Vict. c. 9, s. 9, sub-s. 17, (Dom.):—Held, also, after reviewing the authorities, that the award was valid at common law. *Freeman v. Ontario and Quebec Railway Co.*, 6 O. R. 413.—Rose.

An appeal on petition will not lie from the award of arbitrators appointed under the Dominion Railway Act, 1879, 42 Vict. c. 9 (Dom.). The only mode of impeaching such an award is by an action to set it aside; or else to make the submission a rule of court, and then move to set it aside. The appeal given by R. S. O. c. 165, s. 20, sub-s. 19, only applies to railways over which the Provincial Legislature has jurisdiction, and is not available in such a case as the above:—Sembie, the court has no power to turn such a petition as the present into an action. *Re Lea and The Ontario and Quebec Railway*, 8 O. R. 222.—Proudfoot.

Held, that the Canada Southern Railway, although brought under the jurisdiction of the Dominion before proceedings had been taken for expropriation, was still subject to the Railway Act then in force in Ontario, C. S. C. c. 66. An award having been declared void by the Supreme Court was amended so as to meet the objection, given effect to by that court and was re-executed by the arbitrators after the time limited for making the award had expired. The company having filed a bill to set aside such award, as well as the original award, the defendant, by his answer, asserted the validity of both. The bill was dismissed on the ground that it was unnecessary:—Held, that this, in effect, affirmed their validity, and an appeal was allowed. *Norvell et al. v. The Canada Southern R. W. Co., and three other cases, and The Canada Southern R. W. Co. v. Norvell et al.*, 9 A. R. 310.

Held, that where the company's arbitrator had not been notified pursuant to the statute of time and place appointed for signing awards between the company and land owners, such awards were invalid by the statute C. S. C. c. 66, s. 11, sub-s. 11, and that although he had notified the other arbitrator that he would not attend, and waived any notice. *Ib.*

D. brought an action to compel a railway company to arbitrate to ascertain the value of certain land taken for the purposes of the railway company, and after the service of the writ the company served a notice to arbitrate, and after arbitration an award was made by two of the arbitrators, but was subsequently set aside by the court as invalid. D. then proceeded with his action, and the railway company pleaded that the arbitrators had fixed a time for the making of the award, but did not make any within the time limited, and did not enlarge the time, and that therefore the sum of \$400 offered by the railway company before proceedings taken had become the amount of the compensation. The learned judge found on the evidence that no time had been fixed by the arbitrators for making the award:—Held, that as the parties by their pleadings had placed themselves upon an issue as to whether the arbitrators had fixed a time or not, and as that issue was found in favour of the plaintiff, the sum of \$400 offered had not become the compensation to be paid, and a reference back was ordered. *Demoreux v. The Grand Junction R. W. Co. et al.*, 10 O. R. 515.—Ferguson.

Certain land was expropriated by the defendants in 1876, and proceedings to obtain compensation therefor were begun in 1884. On the 25th May, 1883, the defendants' railway became by statute a Dominion road having previously been

an Ontario road:—Held, that the procedure provided by the Dominion Consolidated Railway Act, 1879, applied to the proceedings, and therefore that an appeal under the provisions of the Revised Ontario Railway Act could not be prosecuted. *Darling v. The Midland Railway Co.*, 11 P. R. 32.—Boyd.

Money was paid into a bank under Consolidated Railway Act, 1879, (Dom.) s. 9, sub-s. 28, and an order for immediate possession of lands expropriated by the company was made by a judge under the sub-section, and an award of compensation was made subsequently:—Held, that the landowner was entitled to interest on the amount awarded him only at the rate allowed by the bank on the money paid in, and not at the legal rate. *Re George Taylor and The Ontario and Quebec Railway Co.*, 11 P. R. 371.—O'Connor.

An order was obtained for immediate possession of land under the Consolidated Railway Act, 1879, (Dom.) and money was paid into the Canadian Bank of Commerce under the same Act by the company:—Held, that the landholder was entitled to interest upon the amount subsequently awarded him from the date of the award, only at the rate allowed by the bank upon a deposit, and not at the legal rate of six per cent. *Re Lea*, 21 C. L. J. 154, followed. In the litigation that ensued, it was determined that neither party was entitled to the costs of arbitration under the statute; but the company, in order to take up the award, paid the whole of the arbitrators' fees:—Held, that a summary order could not be made to recoup the company for one-half the fees out of the moneys payable to the land-owners, and such order was refused without prejudice to an action for the same purpose. *Re Philbrick and Ontario and Quebec Railway Co.*, 11 P. R. 373.—Boyd.

See *In re Arbitration between The Ontario and Quebec Railway Co. and George Taylor*, 6 O. R. 338 p. 576; *James v. The Ontario and Quebec Railway Co.*, 12 O. R. 624, p. 577.

## II. CONSTRUCTION OF RAILWAYS.

### 1 Bridges and Subways.

Action to recover damages for injuries sustained by the plaintiff by reason of an overhead bridge being less than seven feet above the top of the defendants' car. At the time of the accident the defendants were operating the Midland Railway under an agreement made 22nd September, 1883, whereby it was agreed that the defendants should take over all the lines of the Midland Railway Company, buildings, rolling stock, stores, and materials of all kinds, and should, during the continuance of the agreement well and efficiently work the said lines and keep and maintain them with all the works of the Midland Railway in as good repair as they were when so taken over. The agreement was to be in force for twenty-eight years. The Midland Railway Company, though incorporated under 44 Vict. c. 67, (Ont.) was brought under the control of the Parliament of Canada, and made a Dominion Railway, by 46 Vict. c. 24 (Dom.), passed in 1883, before the agreement was made. By the Act of 1881, 44 Vict. c. 24, s. 3 (Dom.), amending the Consolidated Railway Act of 1879, every bridge or other erection or structure under which any railway, passes, &c., existing at the time of the passing

of the Act of sufficient to admit seven feet in twelve so as to a of at least municipality may be, when the relative au railway owned by from the with the Act make for any n that the c sustaine necessari ance of l shew that that he w dark; an even kne bell rope the statio through a peared, th until just was attac Held, tha guilty of f v. The G See We Parkdale Sheep h his prem owing to c into lands the railwa passing tr of the Cou not liable fully on Trunk R. The pla adjoining Their hors which the they had were killed the judgm the plainti defendant lot from w fore, that good their Canadian The mo "Tenant," 7 O. R. 67 The plan ing lots on Nadeau as a squatter was arrang together.

the procedure provided by the consolidated Railway Act, and there-  
provisions of the Act could not be pro-  
land Railway Co.,

under Consol-  
Dom.) s. 9, sub-  
iate possession of  
pany was made by  
and an award of  
equently:—Held,  
led to interest on  
at the rate allow-  
in, and not at the  
nd *The Ontario and*  
371.—O'Connor.

immediate posses-  
lated Railway Act,  
paid into the Cana-  
er the same Act by  
the landholder was  
mount subsequently  
of the award, only  
ank upon a deposit  
six per cent. Re-  
l. In the litigation  
l that neither party  
arbitration under the  
in order to take up  
the arbitrators' fees,  
or could not be made  
ne-half the fees out-  
the land-owners, and  
out prejudice to an-  
Re *Philbrick and*  
Co., 11 P. R. 373.—

en *The Ontario and*  
rye Taylor, 6 O. R.  
Ontario and Quebec  
p. 577.

## RAILWAYS.

### Highways.

for injuries sustained  
an 'overhead bridge  
above the top of the  
e of the accident the  
the Midland Railway  
nd September, 1883,  
ne defendants should  
e Midland Railway  
g stock, stores, and  
should, during the  
t well and efficiently  
and maintain them  
Midland Railway in  
when so taken over  
in force for twenty  
Railway Company,  
4 Vict. c. 67, (Ont-  
rol of the Parliame-  
minion Railway, 1883,  
l in 1883, before the  
the Act of 1881. In  
ending the Consol-  
every bridge or other  
which any railway  
time of the passing

of the Act, of which the lower beams were not  
of sufficient height from the surface of the rails  
to admit of an open and clear headway of at least  
seven feet, shall be reconstructed or altered with-  
in twelve months from the passing of the Act,  
so as to admit of such open and clear headway  
of at least seven feet, at the cost of the company,  
municipality, or other owner thereof, as the case  
may be, &c. By 44 Vict. c. 22 (Ont.) passed  
when the Midland Railway was under the legis-  
lative authority of the Province of Ontario, that  
railway was required to reconstruct bridges  
owned by the company within twelve months  
from the passing of the Act in terms identical  
with the Dominion Act except that the former  
Act makes every railway liable to its servants  
for any neglect, &c.:—Held, Galt, J., dissenting,  
that the defendants were not liable for the injury  
sustained by the plaintiff. The plaintiff was  
necessarily on the top of the car in the perform-  
ance of his duty. There was no evidence to  
show that he knew, at the time of the accident,  
that he was near the bridge, the night being  
dark; and it was a matter of doubt whether he  
even knew that the bridge was too low. The  
bell rope was not connected before the train left  
the station, but this did not appear to have been  
through any neglect of his, and for all that ap-  
peared, the train might not have been completed  
until just before starting, and until the engine  
was attached no connection could be made:—  
Held, that the plaintiff could not be deemed  
guilty of contributory negligence. *McLaughlin*  
v. *The Grand Trunk R. W. Co.* 12 O. R. 418.

See *West v. The Corporation of the Village of*  
*Parkdale*, 12 A. R. 393, p. 404.

### 2. Fences.

Sheep belonging to the plaintiff escaped from  
his premises on to the highway, and from thence  
owing to defects in the fences of the defendants  
into lands of theirs, whence they strayed on to  
the railway track where they were killed by a  
passing train:—Held, (reversing the judgment  
of the County Judge) that the defendants were  
not liable for the loss, the sheep not being law-  
fully on the highway. *Daniels v. The Grand*  
*Trunk R. W. Co.*, 11 A. R. 471.

The plaintiffs occupied about an acre of lot 29  
adjoining the railway of the defendant company.  
Their horses pasturing on another part of the lot,  
which the plaintiffs did not occupy and to which  
they had no title, passed on to the track and  
were killed by a passing train:—Held, (affirming  
the judgment of the Q. B. D., 7 O. R. 673,) that  
the plaintiffs were not entitled to call upon the  
defendant company to fence across the part of the  
lot from which the horses escaped; and there-  
fore, that the company were not liable to make  
good their loss to the plaintiffs. *Conway v. The*  
*Canadian Pacific R. W. Co.*, 12 A. R. 708.

The meaning of the terms "Proprietor,"  
"Tenant," and "Occupant," considered. *S. C.*,  
7 O. R. 673—Q. B. D.

The plaintiff and one Nadeau, occupied adjoin-  
ing lots on the line of the defendants' railway;  
Nadeau as the locotee of the Crown, plaintiff as  
a squatter and by agreement between them it  
was arranged that their horses should pasture  
together. One of the plaintiffs horses strayed

from Nadeau's lot on to the track of the defend-  
ants which at that point was unfenced—and was  
killed by a passing train. In an action for the  
value of the horse it was:—Held, that "occu-  
pied lands" under the Railway Act 46 Vict. c.  
24, (Dom.), denote lands adjoining a railway and  
actually or constructively occupied up to the line  
of the railway by reason of actual occupation of  
some part of the section or lot by the person who  
owns it or is entitled to possession of the whole,  
and that although mere occupation such as that  
of a squatter is not provided for in the Act, N.  
was, under the circumstances, entitled to require  
the defendants to fence, notwithstanding he had  
omitted to fulfil the conditions of his location by  
performance of the settlement duties required  
thereby—the Crown never having taken steps to  
cancel such location; that under the circum-  
stances the question as to contributory negli-  
gence did not arise, and therefore plaintiff was  
entitled to recover. *Davis v. Canadian Pacific*  
*R. W. Co.*, 12 A. R. 724.

As to erecting barbed wire fences. See *Hill-*  
*yard v. The Grand Trunk R. W. Co.*, 8 O. R.  
583.

### 3. Gates.

Plaintiff's horses, in consequence of insecure  
fastening of the gates at the farm crossing, where  
the defendants' railway crossed their farm, got  
through the gates and on the railway track, and  
were killed by a passing train:—Held, that the  
plaintiffs by reason of the continued use of the  
faulty fastening, could not be deemed to have  
adopted them as sufficient, and that it was the  
duty of the defendants to provide and maintain  
proper fastenings for the gate. Section 9 of the  
statute 47 Vict. c. 11 (Dom.), commented on as  
to the nature of the duty cast on the plaintiffs  
to keep the gates closed; and:—Quære, whether  
the words in that Act, that the owners must  
keep the gates closed, extend further than in re-  
spect of their own use of them; or whether if  
the gate, became open by any accidental means,  
or by the act of a stranger, and remained open  
without any person being near to prevent ani-  
mals passing through it, the owner or occupier  
would be liable to the full extent provided by  
the Act, although it had become open without  
his agency or neglect, and remained so without  
his knowledge. *McMichael v. The Grand Trunk*  
*R. W. Co.*, 12 O. R. 547.—Cameron.—Q. B. D.

### 4. Packing Frogs of Rails.

Action by plaintiff, as administrator of C.,  
for damages under 44 Vict. c. 22 (Ont.), by rea-  
son of the omission to pack a frog on the Mid-  
land Railway which the defendants were opera-  
ting, whereby C.'s foot was caught in the frog  
and he was killed by a train:—Held, that de-  
fendants were not liable; that the Midland Rail-  
way was a railway connecting with or crossing  
the defendant's railway, and under 46 Vict. c.  
24 (Dom.), was exempt from the operation of the  
Ontario Act:—Held, also, that the omission to  
state in the statement of claim, as required by  
sub-s. 2 of s. 8 of said Ontario Act, and to prove,  
that the defendants knew that the frog was not  
packed, or that the deceased did not know it,  
or that he had notified the defendants or any

person superior to himself in the service of the defendants, or that such person was not aware thereof would preclude any recovery. *Clegg v. The Grand Trunk R. W. Co.*, 10 O. R. 708—C. P. D.

### III. INJURIES TO PERSONS AND CATTLE.

#### 1. At Road Crossings.

The plaintiff, early in the morning, it not being quite day-break and snowing a little, was driving a yoke of oxen and a pair of bob sleighs along the highway towards a railway crossing, sitting on the front bob, low down behind the oxen. The track crossed the highway at an acute angle, and was some seven feet above the highway, which was graded up to it. At the crossing there were some bushes which obstructed the view, but before reaching them there was a view of the track for some sixty or seventy rods, but not while in the hollow at the bottom of the grade and sitting as the plaintiff was. The plaintiff without looking out for the train, drove on to the track, and as he did so he saw a train approaching a few rods off, when he jumped to the off side and hit the off ox, causing it to spring aside and clear the track, but before he could get clear himself he was struck by the train and injured. It was urged that the plaintiff by so doing voluntarily exposed himself to danger; but there was evidence to the contrary. The defendants' engine had an automatic bell. A witness stated that these bells do not always ring when the train is in motion. The engineer stated that the bell was in good order when the engine left the last station, but he could not say whether or not it was ringing when the accident happened, while a number of witnesses stated that the bell was not then ringing. The jury found that the bell was not ringing; that it was not in good order; and that the plaintiff exercised reasonable care. On motion to enter a nonsuit:—Held, Wilson, C. J. doubting, that there was evidence for the jury; that it could not be said that the findings were not justified, and the court therefore refused to interfere. *Wilton v. The Northern Railway Co.*, 5 O. R. 490.—C. P. D.

The deceased, who was well acquainted with the locality, while driving along a road running in the same direction as and crossing the railway, was killed at the crossing by a locomotive, not a regular train. The jury found that the engine was going unusually fast; that the whistle was sounded at another crossing, three-fifths of a mile off, but was not continued; and that deceased was not guilty of contributory negligence. The Common Pleas Division, upon the evidence more fully stated in the report refused to disturb this verdict, and on appeal their judgment was affirmed, Cameron, C. J., dissenting, on the ground that the plaintiff was bound to disprove contributory negligence; that she had failed to do so, for had deceased looked he must have seen the train coming; and that there should therefore have been a nonsuit. *Davey v. The London and South Western R. W. Co.*, 11 Q. B. D. 215; 12 Q. B. D. 70, and Lublin, Wicklow, and Wexford R. W. Co. v. Slattery, 3 App. Cas. 1155, commented on. Per Patterson, J. A., and Rose, J., whether admitting *Davey v. The London and South Western R. W. Co.*, to decide that the plaintiff must negative contributory negligence, it is applicable here, in view of the statutory duty to give warning by bell or whistle, which does not exist in England. *Pearcy v. The Grand Trunk R. W. Co.*, 10 A. R. 191.

On the crossing of the G. W. railway in the town of S., operated by the defendants, was killed by a train of the defendants, which was then, as found by the jury, running at a high rate of speed without ringing a bell continuously or sounding a whistle at short intervals. The jury at the trial answered all the questions submitted to them in a manner favourable to the plaintiff and adversely to the company, and negatived any contributory negligence on the part of the deceased. On appeal it was:—Held, by this court, affirming the judgment of the court below, 8 O. R. 601, that there was sufficient evidence of negligence to warrant the findings of the jury in favour of the plaintiff. *Beckett v. The Grand Trunk R. W. Co.*, 13 A. R. 174. Affirmed by the Supreme Court.

#### 2. Damages.

The deceased had effected a policy of insurance on his life which was in force at the time of his death. At the trial the jury were directed to deduct the amount of the policy from the verdict, which amount was afterwards added by the Divisional Court. On appeal from the judgment of the Queen's Bench Division, 8 O. R. 601 this court being equally divided in opinion on this branch of the case, the appeal was dismissed, with costs. Hagarty, C. J. O., and Osler, J. A., were of opinion that the actual loss or injury resulting from the death, can alone be recovered in such a case, and if a large increase of fortune occurs to the parties as a result of such death, or property, or money falls to them as a like result whether under a settlement or in the shape of a life insurance effected for their benefit, that must be taken into consideration in estimating the loss sustained. Burton, J. A., was of opinion that under the circumstances the Divisional Court were right in increasing the verdict by the amount of the insurance money. Per Patterson, J. A.—The receipt of the insurance money is a proper matter for the consideration of the court or a jury in estimating the damages, and might afford ground for making some reduction from a gross assessment, but in the present case there was nothing shewn to warrant any reduction. *Hicks v. Newport, &c., R. W. Co.*, in note, 4 B. & S., at p. 403, commented on. *Beckett v. The Grand Trunk R. W. Co.*, 13 A. R. 174.

#### 3. Liability for Injuries to Servants.

The statement of claim alleged that the plaintiff was employed by the defendants to work at track laying; that while so employed the defendants directed and required him to assist in bringing railway supplies to the place where they were being used; that they also directed and required him to be carried, as part of his employment, on the defendants' trains; that accordingly he was received by the defendants to be safely carried on a train, and that owing to the defendants' negligence he was, while so travelling, thrown off the train and injured:—Held, 1. That if the plaintiff accepted a different employment from that originally con-

licable here, in view of the warning by bell or whistle in England. *Peart v. The Great N. W. Co.*, 10 A. R. 191. The highway at the place where the plaintiff was killed by a train was then, as found by the jury, of a rate of speed without the use of a whistle or sounding a whistle. The plaintiff was killed by a train at the trial and admitted to them in a judgment of the plaintiff and adversely affected any contributory negligence of the deceased. On appeal, the court, affirming the judgment, 8 O. R. 601, that the plaintiff was negligent, and the verdict in favour of the plaintiff was reversed. *Grand Trunk R. W. Co.*, the Supreme Court.

*See* *Peart v. The Great N. W. Co.*, 10 A. R. 191. A policy of insurance was issued at the time of his death. The jury were directed to find for the plaintiff from the verdict. The Divisional Court, in the judgment of the court, 8 O. R. 601 this court affirmed the judgment on this branch of the case, dismissed, with costs. *Wesley, J. A.*, were of opinion that the plaintiff was negligent or in the shape of a contributory negligence, that must be recovered in such a case of fortune occurs. The Divisional Court, in the verdict by the jury. Per Patterson, J., insurance money is a consideration of the court. The damages, and might be a reduction from the present case there is no reduction. *W. Co.*, in note, 4. *Beckett v. The Great N. W. Co.*, 13 A. R. 174.

*See* *Peart v. The Great N. W. Co.*, 10 A. R. 191.

alleged that the plaintiff was negligent in not stopping the train. The jury found for the plaintiff and the verdict was reversed. *Grand Trunk R. W. Co.*, 10 A. R. 191.

amplified, he became the defendants' workman, in that new employment, just as he had been in his former employment. 2. That the statement that the plaintiff was received on the train "to be safely carried" did not imply that a special bargain was made "to safely carry," but only that the plaintiff was to be safely carried as one of their workmen in the course of his employment; and that there was no cause of action. *May v. Ontario and Quebec R. W. Co.*, 10 O. R. 70.—Wilson.

On the undisputed facts disclosed in the plaintiff's case it appeared that there was a switch-track erected in the defendants' yard close to the track, the deceased, who was a brakeman in the defendants' employment, being aware of its position and proximity to the track. On the day in question the deceased was engaged as a brakeman on a train passing through the yard. His position as brakeman should have been on top of the car, but for some reason which did not appear, he was on the side of the car, holding on to the ladder, by which brakemen mount to the top of the car, and his attention being drawn towards the end of the train he did not see the switch-stand, when he was struck by it and thrown under the wheels of the car and killed:—Held, that there was no evidence of negligence on the part of the defendants; and that there was such want of care on the part of the deceased as disentitled the plaintiff, his administrator, to recover; and the case was therefore properly withdrawn from the jury. *Ryan v. The Canada Southern R. W. Co.*, 10 O. R. 745.—C. P. D.

*See* *Clegg v. The Grand Trunk R. W. Co.*, 10 O. R. 708, p. 583; *McLauchlin v. The Grand Trunk R. W. Co.*, 12 O. R. 418, p. 581.

#### 4. Other Cases.

The Crown is not liable as a common carrier for the safety and security of passengers using government railways. *Regina v. McLeod*, 8 S. C. R. 1.

Held, affirming the judgment of the Court of Appeal for Ontario, 8 A. R. 482, that Consolidated Statutes of Canada, c. 66, s. 104, must be construed as enuring to the benefit of all persons who, using the highway which is crossed by a railway on the level, receive damage in their person or their property from the neglect of the railway company's servants in charge of a train to ring a bell or sound a whistle, as they are directed to do by said statute, whether such damage arises from actual collision, or as in this case by a horse being brought over near the crossing and taking fright at the appearance or noise of the train. The jury in answer to the question, "If the plaintiff had known that the train was coming would they have stopped their horse further from the railway than they did?" said "Yes":—Held, though this question was indefinite, the answers to the questions as a whole, viewed in connection with the judge's charge and the evidence, warranted the verdict. *The Grand Trunk R. W. Co. v. Rosenberger*, 9 S. C. R. 312.

Where, after calling out the name of the next station, a railway train was slowed up on approaching and passing it, but was not brought to a full stop, and the plaintiff, who had purchased a ticket for that station, received injuries

on alighting there:—Held, affirming the judgment of the Q. B. D., 4 O. R. 201, that there was evidence of an invitation to alight, and that it was for the jury to say whether she had acted in a reasonably prudent and careful manner in availing herself of it. *Edgar et al. v. The Northern R. W. Co.*, 11 A. R. 452.

#### IV. FIRE FROM ENGINES.

Action for negligence against the defendants in the conduct of their engine, whereby, as alleged, fire escaped therefrom and destroyed the plaintiff's property. The only evidence to connect the defendants therewith was that the fire occurred immediately after the engine had passed the plaintiff's barn and combustible manure heap: that as it passed steam was put on which might have caused a larger quantity of sparks to escape from the smoke-stack; or, if the ash-pan were full, which there was no evidence to shew, would cause cinders to be forced therefrom: that there was a strong wind blowing across the track in the direction of the plaintiff's premises: that a cinder too large to come from the smoke-stack was picked up on the manure heap while it was on fire; but it did not clearly appear whether the cinder was from coal or wood, the engine burning coal: that this fire was put out, and five minutes afterwards a fire broke out in a barn adjoining the plaintiff's, and both were consumed. There was a steam saw-mill close by, but in a direction opposite from that in which the wind was blowing, and there was evidence that fire therefrom had ignited the saw-dust in the mill-yard on two occasions. No evidence was given of any faulty construction in the engine, but there was evidence that it was of approved make, with proper appliances to prevent, as far as possible, the escape of fire:—Held, *Rose, J.*, dissenting, that there was no evidence of negligence to go to the jury, and that the case was properly withdrawn from them. Per *Rose, J.*, that there should be a new trial, to ascertain, if possible, the cause of the fire, whether from the smoke-stack or the ash-pan, or how otherwise; and, if from either the smoke-stack or ash-pan, whether there was negligence on the part of the defendants. Per *Cameron, C. J.*, the putting on of steam when the engine was near the plaintiff's premises did not of itself constitute negligence, it being done in the ordinary course of traffic, the engine having the ordinary and proper appliances for protection against the escape of fire, which it was lawful for the defendants to use. *McGibbon v. The Northern and North-Western R. W. Co.*, 11 O. R. 307.—C. P. D. Reversed, see 14 A. R. 91.

R. owned a barn situated about two hundred feet from the New Brunswick Railway Company's line, and such barn was destroyed by fire, caused, as was alleged, by sparks from the defendants' engine. An action was brought to recover damages for the loss of said barn and its contents. On the trial it appeared that the fuel used by the company over this line was wood, and evidence was given to the effect that coal was less apt to throw out sparks. It also appeared that at the place where the fire occurred there was a heavy up-grade, necessitating a full head of steam, and therefore increasing the danger to surrounding property. The jury found



that the defendants did not use reasonable care in running the engine, but in what the want of such care consisted, did not appear by their finding:—Held, reversing the judgment of the court below, that the company were under no obligation to use coal for fuel, and the use of wood was not in itself evidence of negligence; that the finding of the jury on the question of negligence was not satisfactory, and that therefore there should be a new trial. *New Brunswick Railway Co. v. Robinson*, 11 S. C. R. 688.

#### V. CARRIAGE OF GOODS.

Four carloads of flour were delivered to defendants to be carried from Newmarket, Ont., to Chatham, N. B., under a special contract whereby defendants were not to be liable for any delay occasioned by want of opportunity to forward goods beyond places where defendants had stations, but they could forward them to their destination by public carriers or otherwise, as opportunity might offer; that pending communication with the consignees the goods remained on the defendants' premises at the owner's risk; and that defendants were not to be liable after notification to the carriers, that they were ready to deliver the goods for further conveyance; and that defendants were not to be liable for loss by fire. It appeared that the defendants' line did not extend beyond Toronto, and that the goods were to be forwarded by the G. T. R.: that on their arrival at Toronto, they were placed in defendants' freight sheds, and notice, addressed to the consignee, sent to the consignor at Newmarket, and also to the G. T. R. Co., that the defendants were prepared to deliver the goods for further conveyance; and that, after such notice, while the goods were in defendants' freight sheds, they were destroyed by fire without any negligence on defendants' part:—Held, that defendants were not liable as carriers, because they had expressly limited their liability; nor as warehousemen, because no negligence was shewn; the only negligence suggested being that defendants did not procure or supply cars for the transshipment before the fire, but that this was not sustainable; and even if this could constitute negligence:—Quære, whether the recovery could be for more than nominal damages, i.e., whether the loss by fire was the damage naturally resulting from such negligence. *Bradie v. The Northern Railway Co.*, 6 O. R. 180.—Rose.

A dealer in horses hired a car from the Grand Trunk R. W. Co. for the purpose of transporting his stock over their road, and signed a shipping note by which he agreed to be bound by the following, among other conditions: (1) The owner of animals undertakes all risks of loss, injury, damage, and other contingencies, in loading, &c. (2) When free passes are given to persons in charge of animals, it is only on the express condition that the railway company are not responsible for any negligence, default or misconduct of any kind, on the part of the company or their servants, or of any other person or persons whomsoever, causing or tending to cause the death, injury or detention of any person or persons travelling upon any such free passes—the person using any such pass takes all risks of every kind, no matter how caused. The horses were carried over the Grand Trunk Railway in

charge of a person employed by the owner, such person having a free pass for the trip; through the negligence of the company's servants a collision occurred by which the said horses were injured:—Held, per Ritchie, C. J., and Fournier and Henry, JJ., affirming the judgment of the Court of Appeal, 10 A. R. 162, that under the General Railway Act, 1868 (31 Vict. c. 68), s. 20, sub-s. 4, as amended by 34 Vict. c. 43 s. 5, re-enacted by Consol. Ry. Act, 1879 (41 Vict. c. 9), s. 25, sub-ss. 2, 3, 4, which prohibited railway companies from protecting themselves against liability for negligence by notice, condition or declaration, and which applies to the Grand Trunk R. W. Co., the company could not avail themselves of the above stipulation that they should not be responsible for the negligence of themselves or their servants. Per Strong and Taschereau, JJ., that the words "notice, condition or declaration," in the said statute, contemplate a public or general notice, and do not prevent a company from entering into a special contract to protect itself from liability. *The Grand Trunk R. W. Co. v. Vogel*, 11 S. C. R. 612.

The goods in question were shipped by the G. T. R., by plaintiff's agent in T., to plaintiff at M., Manitoba. After much delay some of the goods were delivered in a damaged condition by the C. P. R., whose line touches at M., and some were never delivered at all. Plaintiff brought his action for \$2,000 damages against the G. T. R., and subsequently the C. P. R. were made party defendants. The statement of claim charged the G. T. R. on the contract, and the C. P. R. in tort. The G. T. R. set up a special contract, providing, amongst other things, for exemption from liability in case the goods were delayed, lost, or damaged beyond their line, which ended at Fort G. Before trial plaintiff settled with the C. P. R. for \$650, and executed a release to them, reserving his right to proceed against the G. T. R. for the balance, and notified the solicitor for the G. T. R. The plaintiff's agent stated that the contract was a purely verbal one, and that he paid the freight through to M., and received a receipt which he did not read, but forwarded it to plaintiff. Defendants gave evidence that their contracts of shipment were always contained in a bill of lading, signed by the shipper and retained by the company, and in a corresponding shipping receipt, signed by the company and handed to the shipper. The goods in question were carried in a sealed car from T. to Fort G., and the car was still sealed when delivered to the next carriers en route. The learned judge thought there was no evidence of negligence so far as the line of the G. T. R. extended; but it was not disputed that the goods had been damaged and lost by negligence before they reached the plaintiff. The jury found that the contract was verbal. In answer to questions put by the court, the foreman stated that the bill of lading was signed by one of defendants' clerks, and that a receipt, with the usual conditions endorsed, was handed to plaintiff's agent at the time of shipment:—Held, that the contract, whether verbal or on one of the company's printed forms, was a through contract from T. to M., and that all corporations and persons employed en route were servants of the G. T. R. within the meaning of the Consolidated Railway Act, 1879, sec. 25, sub-sec. 4, and the loss having been admittedly occasioned by negligence, the defendants could



by the owner, such as for the trip; through any servants a collector said horses were, C. J., and Fournier, the judgment of the 1862, that under the (31 Vict. c. 68), s. 20, Vict. c. 43 s. 5, re- 1879 (41 Vict. c. 9), s. 1, prohibited railway companies against liability, condition or declaration to the Grand Trunk could not avail them- sion that they should negligence of them- er Strong and Tache- s "notice, condition id statute, contemp- tice, and do not pre- into a special com- liability. *The Grand* 11 S. C. R. 612.

ere shipped by the G. in T., to plaintiff delays some of the goods delay condition by the hes at M., and some l. Plaintiff brought ges against the G. T. P. R. were made par- ment of claim charged up, and the C. P. R. up a special contract, ings, for exemption goods were delayed, heir line, which ended ntified settled with the ted a release to them, ed against the G. T. R. d the solicitor for the gent stated that the bal one, and that he p M., and received a ead, but forwarded it evidence that their always contained in y the shipper and re- d in a corresponding y the company and e goods in question r from T. to Fort G. d when delivered to

The learned judge- ence of negligence en- R. extended; but it goods had been dam- e before they reached and that the contract questions put by the that the bill of lading- ants' clerks, and the- conditions endorsed, agent at the time of e contract, whether any's printed forms, m T. to M., and that is employed en route R. within the meaning y Act, 1879, sec. 25, ving been admittedly e defendants could

not be relieved by any notice, condition, or declaration.—Held, also, that notice of the release to the C. P. R. having been given to the G. T. R. before the trial, the G. T. R. were not entitled to a new trial on the ground of surprise, or the discovery of new evidence.—Held, also, that the G. T. R. and C. P. R. were not joint contractors or joint tortfeasors, and that proof of the alleged release would not relieve the G. T. R. from liability. *McMillan v. Grand Trunk R. W. Co. et al.*, 12 O. R. 130—Q. B. D.

See *Perkins v. Mississippi and Dominion Steamship Co. (Limited)*, 10 P. R. 198, p. 547; *Hateley et al. v. The Merchants Despatch Transportation Co. et al.*, 12 A. R. 201, p. 73; *Vineberg v. Grand Trunk R. W. Co.*, 13 A. R. 93, *infra*.

## VI. LIABILITY FOR LUGGAGE.

The plaintiff was a passenger on one of defendants' cars occupying a sleeping berth. Before going to sleep he had undressed himself and had put his pocket book containing his money in his trousers' pocket, rolling up his trousers and putting his suspenders around them, and then placed them under his pillow next the wall. When he was called before arriving at his place of destination, he discovered that his pocket book and money were gone. No negligence in the defendants was shown.—Held, that no liability attached to the defendants. *Stearns v. The Pullman Car Co.*, 8 O. R. 171—C. P. D.

It is the duty of a railway company to have baggage ready for delivery on the platform at the usual place of delivery, until the owner in the exercise of due diligence can call and receive it; and it is the owner's duty to call for and receive it within a reasonable time. Therefore, where a passenger on arriving at his destination deliberately refrained from applying for his baggage on being told by his cabman that he could not conveniently take it, and on sending for it on the following day, one of three trunks could not be found.—Held, in an action to recover the value of the trunk and the wearing apparel it was said to contain, that the liability of the railway company as common carriers had ceased, and, in this reversing the judgment of the court below, a nonsuit was ordered to be entered. The only claim (if any) which the plaintiff, under the circumstances, had against the company, was as warehousemen or bailees. *Vineberg v. Grand Trunk Railway Co.*, 13 A. R. 93.

## VII. BONDS.

The L. and K. R. W. Co. was incorporated in 1869 (32 Vict. c. 54. P. Q.), to construct a railway from Lévis to the frontier of the state of Maine, a distance of 90 miles. The company was authorized by that Act to issue bonds or debentures to provide funds for the construction of the railway. In 1872, by 36 Vict., c. 45, (P. Q.), power was given to issue bonds to the amount of \$3,000,000 without limitation of time, and without restriction as to the length of the railway constructed. In 1874, a statute of the Legislature of Quebec (37 Vict., c. 23), declared that debentures to the amount of \$250,000 had already been issued, and limited for the future the issuing of bonds to the amount of £300,000

sterling, to be issued as follows:—The first issue of £100,000 at once, the second issue of £100,000 when 45 miles of the road should have been completed and in running order, as certified by the Government inspecting engineer, and the third issue of £100,000 as soon as 30 additional miles—making in all 75 miles—should have been completed, with the same privilege for the three issues. In 1875, by the Act 39 Vict., c. 57, the Legislature amended the former Acts so as to modify the condition to be fulfilled by the L. and K. R. W. Co. before the third issue of £100,000 could be by them made. This condition was as enacted by the said Act, (39 Vict., c. 57,) "so soon as the rails and fastenings required for the completion of the remaining forty-five miles or thereabouts of the company's line shall have been provided, then the remaining one thousand bonds, of one hundred pounds each, to be termed the third issue may be issued by the company."

In the Act lastly cited, the preamble declared: "Whereas it appears that a total length of forty-five miles of the company's line having been completed, a first and second issue each of one hundred thousand pounds of the company's debentures have been made." In March, 1881, the L. and K. Ry. was sold by the sheriff at the suit of the plaintiffs the W. M. Co., and bought by the Q. C. R. Co., respondents, for \$195,000. In April, 1881, the corporation of the City of Quebec (appellants), filed an opposition afin de conserver for \$218, 099, being the amount of 300 debentures of £100 sterling and interest of the second issue issued on the 25th January, 1875, numbered 1020 and upwards, payable on the 1st January, 1894, and for the payment of which the opposants alleged that the said railroad was hypothecated. The Q. C. R. W. Co., also opposants in the case, contested the opposition of the corporation of the City of Quebec, and claimed the issue of the bonds of the second issue and held by the appellants was illegal. At the trial no certificate was produced, but the Government engineer stated that he had reported to the Minister of Railways that there were only 43½ miles of the road completed, and the secretary of the company testified that the total length of railway certified by the Government engineer as being completed and in running order had never exceeded 43½ miles. The learned judge at the trial found as a fact that there were only 43½ miles completed, and held the bonds of the second issue invalid. This judgment was affirmed by the Court of Queen's Bench (appeal side). On appeal to the Supreme Court, it was:—Held, (reversing the judgment of the Court below), that the effect of the statute 39 Vict., c. 57, is to make the bonds therein mentioned good, valid and binding upon the company, although the conditions precedent specified in 37 Vict., c. 23, might not have been fulfilled when they were issued. Ritchie, C. J., and Strong, J., dissenting. Per Fournier and Henry, JJ., that as there was evidence that a certificate or report had been given, oral evidence of the contents of the certificate or report was inadmissible and therefore respondents had failed to prove the illegality of the second issue. *Corporation of the City of Quebec v. Quebec Central R. W. Co.*, 10 S. C. R. 563.

See *Bank of Toronto v. The Cobourg, Peterborough, and Marmora R. W. Co., et al.*, 7 O. R., 1 p. 177.

## VIII. EQUALITY OF RATES.

Held, affirming the judgment of the court below, 9 O. R. 251, that in the absence of collusion the court would not inquire into the reasonableness of the rates charged by a railway company to an express company:—Held, also, that the railway company having granted to one incorporated express company the privilege of employing their station agents to act as agents of that express company, such agents having as employees of the railway company the right to use the company's trucks and baggage house as places for storing goods; and refused the same privilege to another incorporated express company brought themselves within the provisions of sub-s. 3 of s. 60 of 42 Vict. c. 9 (Dom.), which enacts that any railway company granting any facilities to any incorporated express company shall grant equal facilities on equal terms and conditions to any other incorporated express company demanding the same. *Vickers Express Co. v. Canadian Pacific R. W. Co., et al.*, 13 A. R. 210.

## IX. POWERS.

The Northern Railway Company of Canada have no power to take land compulsorily under s. 7, sub-s. 2, or s. 8, sub-s. 10 of the Railway Act, 1870, incorporated in their special Act 50 Vict. c. 5 (Dom.), for the purpose only of obtaining therefrom gravel or other material for the repair or maintenance of their road, because these sections do not confer compulsory powers to take land. Nor have they such powers under s. 9, sub-ss. 38 and 39 of the Railway Act of 1879, because that Act does not apply to their railway:—Semble, even if compulsory powers are conferred by s. 9, sub-s. 10 (1868) the powers are to take materials only, not the land itself, as was attempted in this case. *Re Watson v. Northern R. W. Co.*, 5 O. R. 550.—Osler.

Held, that the Grand Trunk Railway Co., under 14 and 15 Vict. c. 51, had no power to convey or alienate lands; and certainly not lands acquired by them for the purposes of the railway, and which were necessary for its construction, maintenance and accommodation:—Quere, as to such power under Con. Stat. Can. c. 66, s. 9, sub-s. 2. As the deed from the company was not shewn to contain any covenant:—Held, in ejectment against them, that they were not estopped; and—Quere, whether, in any case, they could be estopped in such an action, *Pratt v. The Grand Trunk Railway Co.*, 8 O. R. 499.—O'Connor.

## X. LIMITATION OF ACTIONS.

Held, that s. 34 of R. S. O. c. 165, which fixes a limitation of six months for bringing actions for any damage or injury sustained by reason of any railway, did not apply to an action brought against a railway company for damages for wrongfully taking earth from off the plaintiffs' land. The Corporation of the Township of Brock v. The Toronto and Nipissing R. W. Co., 37 Q. B. 372 followed. *Beard et al. v. Credit Valley R. W. Co.*, 9 O. R. 616.—Ferguson.

In an action brought by the plaintiff for injuries received while being carried on a train, the defendants set up that the injuries complained of

happened more than six months before action brought, and that the action was barred by the 27th sec. of the Consolidated Railway Act, to which the plaintiff demurred:—Held, that any damage done through negligence upon a railway in the carriage of passengers and the like is damage done "by reason of the railway." *Browne v. Brockville and Ottawa R. W. Co.*, 20 Q. B. 202; *McCallum v. Grand Trunk R. W. Co.*, 31 Q. B. 527, and *Kelly v. Ottawa Street R. W. Co.*, 3 A. R. 616, referred to and followed:—Semble, that the concluding words of the 27th sec. of the Consolidated Railway Act, viz, that "the defendants may prove that the same" (that is the damage) "was done in pursuance of the authority of this Act and the Special Act," should be read as meaning "in the course and prosecution of their business as a railway company, constituted in pursuance of," &c. *May v. Ontario and Quebec R. W. Co.*, 10 O. R. 70.—Wilson.

## XI. AID TO RAILWAY COMPANIES BY MUNICIPALITIES.

By 18 Vict. c. 33, the Grand Junction Railway Co. was amalgamated with the Grand Trunk Railway Co. of Canada. The former railway not having been built within the time directed, its charter expired. In May, 1870, an Act was passed by the Dominion Parliament to revive the charter of the Grand Junction Railway Co., but gave it a slightly different name, and made some changes in the charter. After this, in 1870, a by-law to aid the company by \$75,000 was introduced into the county council of Peterborough. This by-law was read twice only, and, although in the by-law it was set out and declared that the ratepayers should vote on said proposed by-law on the 16th November, it was on 23rd November that the ratepayers voted on a by-law to grant a bonus to the appellant company, construction of the road to be commenced before the 1st May, 1872. At the time when the voting took place on the by-law, there was no power in the municipality to grant a bonus. On the 15th February, 1871, the Act 34 Vict. c. 48 (Ont.), was passed, which declared the by-law as valid as if it had been read a third time, and that it should be legal and binding on all persons as if it had been passed after the Act. On the same day of the same year, c. 30 was passed, giving power to municipalities to aid railways by granting bonuses. In 1874 the 37 Vict. c. 43 (Ont.), was passed, amending and consolidating the Acts relating to the company. In 1871 the company notified the council to send the debentures to the trustees who had been appointed under 34 Vict. c. 48 (Ont.). In 1872 the council served formal notice on the company, repudiating all liability under the alleged by-law. Work had been commenced in 1872, and time for completion was extended by 39 Vict. c. 71 (Ont.). No sum for interest or sinking fund had been collected by the corporation of the county of Peterborough, and no demand was made for the debentures until 1879, when the company applied for a mandamus to issue and deliver them to the trustees:—Held, affirming the decision of the court below, 6 A. R. 339, that the effect of the statute 34 Vict. c. 48 (Ont.), apart from any effect it might have of recognizing the existence of the railway company, was not to legalize the

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by-law in favour of the company, but was merely to make the by-law as valid as if it had been read a third time, and as if the municipality had had power to give a bonus to the company, and, there being certain other defects in the said by-law not cured by the said statute, the appellants could not recover the bonus from the defendants. *Per Gwynne, J.* (Fournier and Taschereau, J.J., concurring): As the undertaking entered into by the municipal corporation contained in by-law for granting bonuses to railway companies, is in the nature of a contract entered into with the company for the delivery to it of debentures upon conditions stated in the by-law, the only way in Ontario in which delivery to trustees on behalf of the company can be enforced, before the company shall have acquired a right to the actual receipt and benefit of them by fulfilment of the conditions prescribed in the by-law, is by an action under the provisions of the statutes in force then regulating the proceedings in actions, and not by summary process by motion for the old prerogative writ of mandamus, which the writ of mandamus obtainable on motion without action still is. *Per Henry, J.*, that if appellants had made out a right to file a bill to enforce the performance of a contract ratified by the Legislature, they would not have the right to ask for the present writ of mandamus. *The Grand Junction R. W. Co. v. The Corporation of the County of Peterborough*, 8 S. C. R. 76.

The plaintiffs had obtained an order absolute in the Queen's Bench Division for a mandamus for the delivery to the plaintiffs by the defendant municipality of municipal debentures to the amount of \$75,000 being a bonus to the undertaking of the plaintiffs voted to them by the municipality, together with interest thereon from November, 1870. On appeal to this court that judgment was reversed on grounds equally adverse to any right to proceed by action as to claim by mandamus. The Supreme Court of Canada affirmed that judgment, holding that action and not mandamus was the proper remedy, if any existed, at the same time expressing an opinion that the by-law was invalid. Subsequently the plaintiffs instituted proceedings in the Queen's Bench Division to enforce delivery of the debentures or payment of the amount. At a trial before a judge without a jury the action was dismissed. On appeal this court, without exercising any independent judgment in the matter, acted on the views expressed in its former judgment and by the Supreme Court and dismissed the appeal. *Grand Junction R. W. Co. v. The County of Peterborough*, 13 A. R. 420.

Under 44 and 45 Vict. c. 40, s. 2 (P. Q.), passed on a petition of the Quebec Central Railway Company, after notice given by them, asking for an amendment to their charter, the town of Levis passed a by-law guaranteeing to pay to the Quebec Central Railway Company the whole cost of expropriation for the right of way for the extension of the railway to the deep water of the St. Lawrence river, over and above \$30,000. Appellants, being ratepayers of the town of Levis, applied for and obtained an injunction to stay further proceedings on this by-law, on the ground of its illegality. The provision in sec. 2 of the Act under which the corporation of the town of Levis contended that the by-law was authorized, is as follows: "Provided that within thirty days

from the sanction of the present Act, the corporation of the town of Levis furnishes the said company with its said guarantee and obligation to pay all excess over \$30,000 of the cost of expropriation for the right of way." By the Act of incorporation of the town of Levis, no power or authority is given to the corporation to give such guarantee. The statute 44 and 45 Vict. c. 40, was passed on the 30th June, 1881; and the by-law forming the guarantee was passed on the 27th July following:—Held, reversing the judgment of the Court of Queen's Bench, L. C., appeal side, and restoring the judgment of the Superior Court,—that the statute in question did not authorize the corporation of Levis to impose burdens upon the municipality which were not authorised by their Act of incorporation or other special legislative authority, and therefore the by-law was invalid, and the injunction must be sustained. *Ritchie, C. J.*, dubitante. *Quebec Warehouse Co. v. Levis*, 11 S. C. R. 666.

Under a by-law to grant aid by way of bonus by the issue of debentures to a railway company, no issue or delivery thereof was to take place until certain conditions and stipulations contained in the by-law were performed, amongst others, the completion of the road, and obtaining the certificate of the government engineer. By an agreement entered into before the final passing of the by-law, the company covenanted to perform certain other acts, amongst which was the location of a station "at or near" the corner of certain named streets. By the Municipal Act, R. S. O. c. 174, s. 559, sub-s. 4, authority is given to grant bonuses and issue debentures in aid of a railway company, payable at such times, &c., as the municipal council may think meet. By the defendants' special Act of Incorporation, 36 Vict. c. 70 (Ont.), the debentures were to be issued and delivered to trustees within six months after the passing of the by-law, who were to receive and convert the same into money, and deposit the proceeds in a chartered bank, and pay the same out on the certificate of the chief engineer of the railway company:—Held, on the evidence, that the station, though not located at the corner of the said streets, was not so far therefrom as to prevent its location being, by reasonable intentment, within the meaning of the word "near;" at all events, non-compliance with the terms of the agreement not covered by the conditions, &c., of the by-law would not prevent the accruing of the plaintiff's title to the debentures; but that the defendants' remedy must be for damages for breach of covenant. Held, also, that a compliance with the terms of the general Act was sufficient, for that the provisions of the special Act were not restrictive, but enabling and enlarging the powers under the general Act; and that under the circumstances the appointment of trustees would have been useless. *Bickford v. The Corporation of the Town of Chatham*, 10 O. R. 257.—*Cameron*. Affirmed 14 A. R. 32.

Held, following *Canada Atlantic R. W. Co. v. Corporation of Ottawa*, 12 A. R. 234, that under s. 559, sub-s. 4 of the Municipal Act, R. S. O., c. 174, a grant by way of bonus may be made to a Dominion railway. *The Canada Atlantic R. W. Co. v. The Corporation of the Township of Cambridge*, 11 O. R. 392.—*C. P. D.* Reversed by Court of Appeal, 23 C. L. J. 236.

See *Canada Atlantic R. W. Co. v. Corporation of Ottawa*, 12 A. R. 234, p. 449; *The Corporation of the City of St. Thomas v. The Credit Valley R. W. Co.* 12 A. R. 273, p. 659.

## XII. MISCELLANEOUS CASES.

Loss of property on sleeping car. See *Stearns v. The Pullman Car Co.*, 8 O. R. 171, p. 589.

See *West v. The Corporation of the Village of Parkdale et al. and Carroll et al. v. the same Defendants*, 7 O. R. 270; 8 O. R. 59; 12 A. R. 393, p. 464.

## XIII. SPECIAL ACTS RELATING TO PARTICULAR RAILWAYS.

Under 45 Vict. c. 67, s. 6 (Dom.), the Midland railway, as constituted by the Act, is the company, that strangers or persons having claims, &c., upon any of the companies incorporated by the Act, should proceed against for the enforcement of their rights. *Demorest v. The Midland Railway of Canada et al.*, 10 P. R. 73.—Cameron.

See *Re Watson v. Northern Railway Co.*, 5 O. R. 550, p. 591; *Pratt v. The Grand Trunk R. W. Co.*, 8 O. R. 499, p. 591; *Bickford v. The Corporation of the Town of Chatham*, 10 O. R. 257, p. 594; *Murphy v. The Kingston and Pembroke Railway Co.*, 11 O. R. 582, p. 574.

## RECEIPT.

Legatee having given a receipt not bound to execute a release. See *Kaiser v. Boynton*, 7 O. R. 143, p. 403.

## RECEIVER.

The plaintiff, a judgment creditor of the P. D. & L. H. R. W. Co., claimed in this action to have a receiver appointed in order to enable him to obtain equitable execution of his judgment by receiving the share of the P. D. & L. H. R. W. Co. of the earnings of the L. E. R. W. Co., who had acquired the road of the P. D. & L. H. R. W. Co., and had put it in possession of the G. T. R. W. Co. as lessees. The whole surplus earnings of the P. D. & L. H. R. W. Co. were by statute made applicable, and were being applied by the G. T. R. W. Co. towards reducing the incumbrances, the interest on which they were insufficient to pay:—Held, that in the appointment of a receiver the court acts only upon a proper case being made out for the exercise of its jurisdiction, according to well established principles, and in that sense only can a receiver be said to be *ex debito justitiæ*, whether the application be interlocutory or made at the hearing, whether the appointment of the receiver is the sole object of the action or only incidental to other relief, and whether the relief is sought at the instance of a judgment creditor, or of any one else. Under the circumstances appearing in this case the court affirmed the judgment of *Ferguson, J.*, 8 O. R. 256, refusing the appointment of a receiver. *Smith v. The Port Dover and Lake Huron Railway Co. et al.*, 12 A. R. 288.

A receiver, appointed as the company were here, has a right to assert his claims actively,

though he may require in some instances the sanction of the court; and a contention having been raised as to a forfeiture of the interest of the legatee, leave was given to the company to assert their claim by an action. *Re Morphy—Morphy v. Niven et al.*, 11 P. R. 321.—Boyd.

See *Wallace et al. v. Wallace et al.*, 11 O. R. 574, p. 437.

## RECOGNIZANCE.

Held, that on the return of a writ of certiorari a recognizance is unnecessary. *Regina v. Nunn*, 10 P. R. 395.—Rose.

Held, that since the passing of the Dominion Statute 49 Vict. c. 49, s. 8, there is no longer necessity for a defendant on removal by certiorari of a conviction against him, to enter into the recognizance as to costs formerly required. *Regina v. Swatwell*, 12 O. R. 391.—Wilson.

## RECORD.

Fee on entering. See *Morton v. Grand Trunk R. W. Co.*, 10 P. R. 62.

## RECTIFYING DEEDS.

See DEED.

## REDEMPTION OF MORTGAGE.

See MORTGAGE.

## RE-ENTRY.

Condition of. See *In re Melville*, 11 O. R. 626.

## REFERENCE.

I. TO ARBITRATION—See ARBITRATION AND AWARD.

II. TO MASTER—See PRACTICE—TRIAL.

## REFORMING DEED.

See DEED.

## REGISTRARS OF HIGH COURT.

See PRACTICE.

## REGISTRATION.

I. OF BILLS OF SALE AND CHATTEL MORTGAGES—See BILLS OF SALE AND CHATTEL MORTGAGES.

II. OF BY-LAWS—See MUNICIPAL CORPORATIONS.

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### III. OF DEEDS—See REGISTRY LAWS.

### IV. OF LIS PENDENS—See LIS PENDENS.

### V. OF PLANS—See REGISTRY LAWS.

### VI. OF MEDICAL PRACTITIONERS—See MEDICAL PRACTITIONER.

### VII. OF PARLIAMENTARY VOTERS—See PARLIAMENTARY ELECTIONS.

## REGISTRY LAWS.

### I. REGISTRARS.

#### 1. Duties and Liabilities of, 597.

#### 2. Fees, 597.

### II. EFFECT OF REGISTERING OR OMITTING TO REGISTER, 598.

#### 1. Discharge of Mortgage—See MORTGAGE.

#### 2. Cloud on Title—See SALE OF LAND.

### III. PLANS, 599.

### IV. MISCELLANEOUS CASES, 599.

### V. MEMORIALS AS EVIDENCE—See EVIDENCE.

### I. REGISTRARS.

#### 1. Duties and Liabilities of.

A will relating to certain land, though registered, was not entered on the abstract index, whereby the plaintiff claimed he was damaged in purchasing a mortgage on the land, the mortgagor having no title. The mortgage was first purchased by S., a solicitor, for himself, and the assignment of it made to the plaintiff, for whom he was accustomed to act, and to whom he afterwards sold. S. was not retained by plaintiff to search the title for him; it was not searched when he sold to the plaintiff; and the learned judge before whom the case was tried held that he relied on the supposed title acquired by the mortgagor by possession.—Held, that the plaintiff could not claim that he was damaged by defendant's omission; and that he could found no action on the search made by S. *Green v. Ponton*, 8 O. R. 471.—C. P. D.

#### 2. Fees.

Where a registrar of deeds was dismissed before the expiration of the year, having received in fees an amount in excess of that specified in the statute, (R. S. O. c. 111, s. 104):—Held, (affirming the judgment of the Queen's Bench Division, 3 O. R. 23), that he was bound to return and pay over to the treasurer of the municipality a proportionate amount of such excess, although not in office at the time prescribed by the statute for making his return; but—Semble, that the treasurer could not maintain an action for such fees before the 15th of January, the day named in the Act for the registrar sending in his return.—Held, also, that the defendant was not entitled to notice of action. *The Corporation of the County of Bruce v. McLay*, 11 A. R. 477.

### II. EFFECT OF REGISTERING OR OMITTING TO REGISTER.

Per Hagarty, C. J. If "equitable lien, charge or interest" be created by deed or by any writing capable of being registered actual notice of such deed or instrument will, under the 67th section of the Registry Act, 31 Vict. c. 20 (Ont.), prevent the effect of priority of registration. But as to equitable liens, &c., evidenced by parol only, amongst others a vendor's lien for unpaid purchase money, they have by that Act been prevented from affecting a duly registered title. In the disposition of real property, unless in cases of actual moral fraud a stringent observance of the registry law is the wisest rule to adopt. Per Proudfoot, J. The fact that a man who knows of another's title to land, buys in such a way as to get a title on the register and then sets the owner at defiance is such a clear case of active fraud as would deprive him of the protection of the Registry Act. Per Patterson, J. A., and Proudfoot, J. The ruling in *Forrester v. Campbell*, 17 Chy. 379, that the Registry Act of 1865 (s. 66), does not avoid an equity as against a subsequent instrument though registered, if taken with notice approved of. *Peterkin v. McFarlane*, 9 A. R. 429.

Y. being the owner of certain land, mortgaged it with other lands to the M. P. R. Society by mortgage, dated 12th July, 1873, registered 14th July, 1873. Subsequently being desirous of selling part and paying off the mortgage and getting a new loan, he by an agreement in writing, arranged with the society to leave the mortgage standing, take a further loan of \$700, and have certain of the lands (of which the lot in question was part) released by the society. A second mortgage for the \$700 advance was prepared and executed dated 1st February, 1875, registered 11th February, 1875, which by mistake as was alleged included all the lands in the first mortgage; and a release dated 9th February, 1875, was duly executed by the society releasing the lot in question from the operation of the mortgage of 12th July, 1873, and was afterwards registered 20th March, 1876. B., the plaintiff, being aware of the agreement, but unaware that the second mortgage included the lot in question, which should have been omitted, loaned Y. certain moneys, and took a mortgage dated 21st May, 1877, registered 6th June, 1877, to secure the payment thereof. The society assigned the second mortgage and all moneys secured thereby to the defendants by assignment dated 1st March, 1880, registered 17th January, 1881, and by deed dated 1st March, 1882, registered 2nd June, 1883, Y. conveyed his equity of redemption to B. In an action by B. to correct the mistake by compelling the defendants to convey the lot in question to B., it was:—Held, affirming the judgment of Ferguson, J., that the combined operation of R. S. O. c. 111, s. 81, and R. S. O. c. 95, s. 8, formed a complete defence, and that the defendants as assignees of the mortgage for value, having the legal estate, might defend as a purchaser for value without notice, and claim also the protection of the Registry Act, as against the plaintiff a subsequent purchaser or mortgagee from the original mortgagor:—Semble, that even as against the mortgagor the defendants would be entitled to prevail. *Bridges v. Real Estate Loan and Debenture Co.*, 8 O. R. 493—Chy. D.

W. and his son W. W., mortgaged separate parcels of land owned in severalty to the defendant company for \$4,000, with a proviso for releasing W. W.'s land on payment of \$500 and the other parcels on payment of sums named. The covenant for payment was joint. W. W. afterwards sold his land to J. W., subject to the payment of \$500 to the company. W. then mortgaged his land to the plaintiff, by an instrument which declared it subject to the company's mortgage, and the manner in which the \$4,000 was distributed upon the lands. The various conveyances were registered. It was proved that W. W. was merely a surety for his father in the mortgage transaction with the company, but the plaintiff had no notice of this:—Held, reversing the judgment of Proudfoot, J., that the plaintiff's registered title prevailed over the equity of W. W. to charge his father's lands with the \$500 for which he (W. W.) had made his land liable, and the land of the son was charged in favour of the plaintiff with the \$500 and interest. *Gray v. Ball*, 23 Chy. 390, approved and followed. *Core v. The Ontario Loan and Debenture Co. et al.*, 9 O. R. 326—Chy. D.

Held, following *Truesdell v. Cook*, 18 Chy. 532, and *Lynes v. Bales*, 25 Chy. 593, that the grantee in a subsequent conveyance, registered before the registry of a previous conveyance from the same grantor, of which the grantee had no actual notice, could maintain an action to have the subsequent conveyance declared entitled to priority over the previous conveyance, and that this court had power so to order upon such terms as seemed just. *Weir v. The Niagara Grape Co. et al.*, 11 O. R. 700—Q. B. D.

See *Platt v. Grand Trunk R. W. Co.*, 12 O. R. 119, p. 162.

### III. PLANS.

Held, reversing the judgment of Proudfoot, J., 9 O. R. 274, that the status of C., as a person, or the assignee of a person, who registered a plan, was a question of law and fact combined for the County Judge to determine upon C.'s application to him, under R. S. O. c. 111, s. 84, to amend the plan, and that his decision was not examinable in prohibition:—Semble, a person not the owner of the property may register a plan, and although this would be at the time a futile proceeding, yet if he afterwards became the owner of the property and adopted the plan, he would be entitled under the Act to have it amended. *In re Chisholm and The Corporation of the Town of Oakville*, 12 A. R. 225.

Held, that though a plan not certified as required by the registry law, R. S. O. c. 111, s. 82, sub-s. 2, had, although deposited in the registry office, no effect under the registry law, yet in a deed reference might be made to it, as it might to any other document in the registry office or elsewhere, for the description or designation of a lot. *Ferguson v. Winsor*, 10 O. R. 13.—O'Connor. See S. C. 11 O. R. 88.

### IV. MISCELLANEOUS CASES.

Held, that a vendor does not complete his title until his deed is registered, i. e., that registration is essential to the title. *Laird v. Paton*, 7 O. R. 137.—Proudfoot.

Sections 82, 83, 84 and 85, of R. S. O. c. 111, (Registry Act), and sections 525 and 527 of the Municipal Act considered. *In re Waddie v. Corporation of the Village of Burlington*, 13 A. R. 104.

See *Roan v. Kronsbein*, 12 O. R. 197, p. 411.

### RELEASE.

I. OF DOWER.—See DOWER.

II. OF SURETY.—See PRINCIPAL AND SURETY.

J. M. and F. M., his wife, were jointly insured in the defendant's company, whose deposit was being administered under R. S. O. c. 160, ss. 21, 22. On 4th February, J. M., without the assent of F. M., signed and sent to the receiver a claim for rebate as empowered under that Act. No acknowledgment of the receipt of this claim was given by the receiver, who, on 27th February, sent J. M. and the other policy holder a circular notifying them of an agreement for reinsurance, and that if they objected thereto, and desired to claim for rebate, they were to do so before 15th March. On 24th February the property was burnt, and J. M. forthwith claimed for the whole loss:—Held, that neither J. M. nor F. M. were bound by the former's claim for rebate. That it was not a release, but an invalid attempt by one to exercise a joint statutory power; or else an attempt to make a new contract, which was not authorized by one of the parties, and was not accepted by the receiver before the loss occurred. Granting that a release by one joint tenant would extinguish the right of both, it does not follow that entering into a new agreement by one will prejudice the right of the other. *Clarke v. Union Fire Ins. Co.—McPhee's Claim*, 6 O. R. 635.—Proudfoot.

Right to compel legatee to execute a release. See *Kaiser v. Boynton*, 7 O. R. 143, p. 403.

See *McMillan v. Grand Trunk R. W. Co.*, 12 O. R. 130, p. 589.

### RELIGIOUS INSTITUTIONS.

I. CHURCHES.—See CHURCH.

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### REMUNERATION.

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### RENT.

See DISTRESS—LANDLORD AND TENANT.

No occupation rent should be charged against one who has been in occupation of land under mistake of title in respect of the increased value thereof arising from improvements which are not allowed him. *McGregor v. McGregor*, 5 O. R. 617.—Ferguson.



of R. S. O. c. 111, 25 and 527 of the *re Waddie v. Corington*, 13 A. R. 104. O. R. 197, p. 411.

CIPAL AND SURETY.

were jointly insured whose deposit was S. O. c. 160, ss. 21, without the assent the receiver a claim under that Act. No part of this claim was on 27th February, by holder a circular for reinsurance, retro, and desired to do so before 15th property was burnt, or the whole loss:—E. M. were bound abate. That it was attempt by one to over; or else an attack, which was not parties, and was not the loss occurred. joint tenant would it does not follow by one will pre-*Clarke v. Union Fire* R. 635.—Proudfoot. execute a release. R. 143, p. 403.

bank R. W. Co., 12

TUTIONS.

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TION.

ADMINISTRATORS—

ADMINISTRATORS.

CIPAL AND AGENT.

STER AND SERVANT.

D AND TENANT.

be charged against tion of land under the increased value aents which are not *McGregor*, 5 O. R.

On the 1st December, 1870, A. M., by deed, conveyed certain lands to his grandsons, W. M. and D. M., as tenants in common; and on the same day an agreement in writing was made between the parties whereby W. M. and D. M. agreed to pay the following sums of money, and fulfil the agreement, namely, that W. M. and D. M. should thenceforward support their mother, the plaintiff, and furnish her with reasonable suitable, and comfortable board, lodging and clothing, and medical attendance during her lifetime, and maintain her in a proper manner; and that in the event of any disagreement between W. M., D. M., and the plaintiff, whereby she would be obliged to leave the said premises, they were to pay her \$55 a year in lieu of such board, &c., and, if not paid, to be recoverable by suit at law. The covenants, payments and annuities to be chargeable against the said land. The plaintiff was no party to the agreement. On the 4th October, 1872, the defendant W. M., for a nominal consideration of \$1,000, conveyed his undivided half interest to the plaintiff; but, of which she said she was not aware; and on 1st March, 1877, she reconveyed the same to W. M. "free from incumbrances." On 12th January, 1882, D. M. sold his undivided half interest to C., and a conveyance was executed, but the sale was never carried through. On 27th September, 1883, D. M. sold his said interest to G. A. B., and, to save registration charges, the conveyance was made by C. to G. A. B. On 20th March, 1884, G. A. B. conveyed to E. and S., who in May, 1884, ejected the plaintiff from the land. The agreement was not registered until 27th January, 1882:—Held, reversing the judgment of Galt, J., at the trial, that the agreement did not create a rent charge, as no power of distress was conferred: that if either a rent service or rent seek there would be a right of distress and apportionment; but if neither, but a covenant charged on land, performance of it would be decreed: that upon the conveyance by W. M. to the plaintiff, the whole charge was not extinguished, but an apportionment took place; and that therefore defendant was entitled to enforce performance against D. M.'s undivided half interest, in the hands of E. and S., whom the evidence shewed were purchasers with notice. *McCaskill v. McCaskill et al.*, 12 O. R. 783.—C. P. D.

## REPAIRS.

See EXECUTORS AND ADMINISTRATORS—LANDLORD AND TENANT.

## REPLEVIN.

Replevin will not lie against a pound keeper. *Abbottson v. Henry*, 8 O. R. 625.—Q. B. D.

In an action of replevin the first count charged the defendant with taking certain goods on premises known as the "Creemore Woollen Mills;" and in the second count with taking certain goods on the premises known as the "Northern and North-Western Station at the said village of Creemore." The defendant pleaded denying the taking and the property, and then for a third plea set up, that one W. was tenant to the defendant of certain premises in the said village known as

"Block B," and certain other premises known as the "Langtry Block;" that rent was in arrear, and because of such arrears of rent the defendant "well avowed the taking of the said goods on the said premises and justly, &c., as a distress for said rent which still remains due and unpaid;"—Held, on demurrer plea bad; for if the "said premises" upon which the alleged taking was made were the premises set out in the plea, then the taking was on other premises than those named in the declaration, and there was no confession, and the plea of non cepit covered this defence; but if the premises named in the declaration were referred to, then defendant confessed the taking and justified for rent due for other premises, which amounted to a taking of the demised premises, so that enough was not shewn. *Robbins v. Coffey*, 7 O. R. 332.—Rose.

In an action of replevin brought in the County Court of Haldimand for a mare taken by the defendants from the plaintiff's close in that county, removed to the county of Brant, and there detained until replevied:—Held, that the taking could not be justified under a warrant issued for the arrest of the plaintiff on a charge of stealing the mare; and although the original taking was justified under a search warrant issued in Haldimand to search the plaintiff's premises in Haldimand for the mare, and to bring it before a justice of that county, yet the subsequent removal to the county of Brant, and detention there were not, and constituted the defendant a trespasser ab initio, and therefore the County Court of Haldimand had jurisdiction to replevy the goods in Brant. *Hoover v. Craig et al.*, 12 A. R. 72.

Where the avowant successfully defends a replevin suit, and subsequently institutes proceedings on the replevin bond, he is not entitled to recover as part of his damages the excess of solicitor and client costs of his defence, over and above his taxed party and party costs in that action. *Burton, J. A.*, dissenting. *Williams v. Crow*, 10 A. R. 301.

Per Osler, J. A.—Semble, that the effect of R. S. O. c. 50, s. 352, is to make the Imperial Act 5 and 6 Vict. c. 97, s. 2, as to costs in cases of replevin on a distress for rent in arrear applicable to our practice. *Ib.*

See *Schaffer v. Dumble*, 5 O. R. 716, p. 100.

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## RULE IN SHELLEY'S CASE.

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*Kenzie*, 10 P. R. 406, p. 552; *Jamieson v. Prince Albert Colonization Co.*, 11 P. R. 115, p. 556.

Rule 428.—See *Walmesley v. Mitchell*, 5 O. R. 427, p. 631; *Arscott v. Lilley et al.*, 11 O. R. 285, p. 390.

Rule 429.—See *Budworth v. Bell*, 10 P. R. 544, p. 133; *Riddell v. McKay*, 11 P. R. 459, p. 133.

Rule 431.—See *North v. Fisher*, 11 P. R. 582, p. 133; *Riddell v. McKay*, 11 P. R. 459, p. 133.

Rule 437.—See *Langtry v. Dumoulin*, 10 P. R. 444, p. 143.

Rule 438.—See *Grant v. Grant*, 10 P. R. 40, p. 144.

Rule 442.—See *Christopher v. Noxon et al.*, 10 P. R. 149, p. 141.

Rule 447.—See *Grant v. Grant*, 10 P. R. 40, p. 143; *Snider v. Snider—Snider v. Orr*, 11 P. R. 140, p. 650.

Rule 448.—See *Langtry v. Dumoulin*, 10 P. R. 444, p. 143.

Rule 449.—See *Snider v. Snider—Snider v. Orr*, 11 P. R. 140, p. 650.

Rule 455.—See *Lovelace v. Harrington*, 10 P. R. 157, p. 672.

Rule 462.—See *Newcombe v. McLuhan*, 11 P. R. 461, p. 376.

Rule 474.—See *Re Olmstead v. Errington*, 11 P. R. 366, p. 556.

Rule 484.—See *Webster et al. v. Leys*, 5 O. R. 599, p. 312.

Rule 490.—See *Williams v. Crow*, 10 A. R. 301, p. 147; *McConnell v. Wilkins*, 13 A. R. 438, p. 147.

Rule 510.—See *Ferguson v. McMartin*, 11 A. R. 731, p. 147; *Wansley v. Smallwood*, 10 P. R. 233, p. 303; *Williams v. Crow*, 10 A. R. 301, p. 147; *Whiting v. Hovey*, 12 A. R. 119, p. 149.

Rule 515.—See *McDonell v. Building and Loan Association*, 11 P. R. 413, p. 136; *Morton v. Hamilton Provident and Loan Society*, 10 P. R. 636, p. 135.

Rule 522.—See *Hickey v. Stover*, 11 P. R. 88, p. 304.

Rule 523.—See *Hickey v. Stover*, 11 P. R. 88, p. 304.

Rule 541(a).—See *Merchants Bank v. Monteith*, 10 P. R. 588, p. 346.

Rule 544.—See *Re Monteith—Merchants Bank v. Monteith*, 11 P. R. 361, p. 552.

Rule 545.—See *Massie v. Massie*, 10 P. R. 574, p. 304. *Pawson v. The Merchants Bank of Canada et al.*, 11 P. R. 72, p. 582.

Rule 583.—See *Re Morphy—Morphy v. Niven*, 11 P. R. 321, p. 263.

#### IV. RULES OF COURT OF APPEAL.

Rule 28.—See *Regan v. Waters*, 10 P. R. 364 p. 152.

### SALE OF GOODS.

#### I. STATUTE OF FRAUDS.

1. *Note or Memorandum*, 608.

2. *Acceptance and Receipt*, 608.

#### II. CONTRACT OF SALE.

1. *Contracts by Letters or Telegrams—See CONTRACT.*

2. *Price and Payment*, 609.

3. *When Property passes to Buyer*, 610.

4. *Purchase by Sample and Inspection*, 612.

5. *Place of Delivery*, 613.

6. *Acceptance and Receipt*, 614.

7. *Other Cases*, 615.

8. *Parol Evidence to Vary—See EVIDENCE.*

III. RESCINDING CONTRACT, 615.

IV. STOPPAGE IN TRANSITU, 616.

V. PARTIES LIABLE, 617.

VI. WARRANTY—See WARRANTY.

VII. SALE OF PARTICULAR ARTICLES.

1. *Intoxicating Liquors—See INTOXICATING LIQUORS.*

2. *Timber—See TIMBER.*

#### I. STATUTE OF FRAUDS.

##### 1. *Note or Memorandum.*

The plaintiff in England sold certain goods to M. & Co., at Toronto. After the arrival of the goods at Toronto, the plaintiff discovered that M. & Co. were insolvent, and he notified his agent to stop the goods; but it appeared that M. & Co. had paid the freight and duty and removed the goods into their warehouse. After negotiations between plaintiff's agent and M. & Co., the latter verbally agreed to hold the goods subject to plaintiff's order, and on the following day wrote plaintiff's agent to the same effect, but no written assent was made thereto. M. & Co. subsequently made an assignment for the benefit of their creditors to defendant, who took possession of the goods, and on demand refused to deliver them up to plaintiff, whereupon trover was brought:—Held, that the goods having become the property of M. & Co., and being of greater value than \$40, in order to re-transfer them to the plaintiff, it was necessary that there should be a memorandum in writing, shewing the terms of the transfer, or some other act sufficient to take the case out of the Statute of Frauds: but—Sembled, if any consideration had been stated between the plaintiff's agent and M. & Co., for the latter assuming the position of bailees of the goods, and holding them for the plaintiff's benefit, the transaction might have been supported as not coming within the statute: *Brassett v. McEwen*, 10 O. R. 179—C. P. D.

Held, that the letters of the defendant, set out in the report of this case and read together in the light of the parol evidence, constituted a sufficient note or memorandum in writing within the 17th sec. of the Statute of Frauds, and that parol evidence was also admissible to shew what the words "work" and "rig" used therein referred to. *Christie v. Burnett*, 10 O. R. 609—Q. B. D.

##### 2. *Acceptance and Receipt.*

Defendant sold the plaintiffs some ten, and verbally agreed that he would take back, at an

or Telegrams—See

609.

to Buyer, 610.

and Inspection, 612.

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FRAUDS.

Memorandum.

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R. 179—C. P. D.

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O. R. 609—Q. B. D.

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advance of ten cents a pound, such part thereof as the plaintiffs should have in stock unsold at a certain date:—Held, (affirming the decision of the Queen's Bench Division,) that there was but one entire conditional contract—not one contract to sell the tea to the plaintiffs, and another to buy it back—and therefore the delivery of the tea by the defendant satisfied the Statute of Frauds, and the plaintiffs were entitled to recover for the defendant's refusal to take back the unsold tea. *Williams v. Burgess*, 10 A. & E. 499, considered and followed. *Lumsden et al. v. Davies*, 11 A. R. 585.

The Statute of Frauds not having been pleaded nor any objection properly taken to the sufficiency of the delivery of goods either at the trial or in the order nisi the court, without deciding that there had been a sufficient delivery, Held that the objection was not open to the defendant and refused to permit an amendment. *Greenizen v. Burns*, 13 A. R. 481.

The defendant, a manufacturer of woollen goods, in company with W. his manager, went to the warehouse of the plaintiffs for the purpose of purchasing wool, where he was shewn a quantity consisting of about 200 sacks of white wool which plaintiffs offered to sell at 24c. a pound for the lot. The defendant, after examining as much of the wool as he desired, ordered ten sacks thereof to be shipped to him immediately with a view of trying it, that is to see if it would produce the quality of goods he dealt in. On the following morning the defendant saw the plaintiff L. personally, and informed him that he would take the lot; and the plaintiffs agreed to carry it for him on certain terms, and on that day the ten sacks were shipped to the defendant. At the same time an invoice was sent containing the memorandum: "Terms, interest at seven per cent., from 1st February," being the terms offered to defendant if he would take the lot. The ten sacks were subsequently received at the defendant's mill and were worked up there:—Held, (reversing the judgment at the trial and of the Divisional Court,) that the agreement to take the lot made before the performance of the first bargain was a variation of or substitution for the first bargain, and that the delivery of the sacks was a delivery and such an actual receipt and acceptance of part of the goods purchased as satisfied the requirements of the 17th sec. of the Statute of Frauds, and that the plaintiffs were entitled to recover the price of the remaining 190 sacks, together with interest from the date mentioned. *Leadlay v. McRoberts*, 13 A. R. 378.

## II. CONTRACT OF SALE.

### 2. Price and Payment.

When there is no actual agreement as to price or time for payment, the law will supply the deficiency by importing into the bargain a promise by the buyer to pay a reasonable price, and by implying, in the absence of evidence to the contrary, that payment should be made on delivery. *Christie v. Burnett*, 10 O. R. 609—Q. B. D.

The Albert Mining Co. (respondent) brought this action to recover for coal sold and delivered to appellants during the years 1866, 1867 and 1868. S. and M., and one McG. were partners

carrying on business under the name of the Albertine Oil Company, the defendant S. furnishing the capital. The contract for the coal was made by S. who was a large stockholder in the plaintiff company and entitled to yearly dividends on his stock. The agreement, as proved by plaintiffs, was that S. purchased the coal for the Albertine Oil Company, the members of which he named; that the president of the plaintiff company told S. they would look to him for payment, as the other partners were poor; that the terms of sale were cash on delivery on board the vessels: and that S. agreed that the dividends payable to him on his stock should be applied in payment for the coal; that in consequence of this arrangement the plaintiffs credited the Albertine Oil Company with the amount of S.'s dividends as they were declared from time to time down to August, 1866, leaving a balance of \$912 due to S. It also appeared that the coal delivered was charged in the plaintiff's books to the Albertine Oil Company, and that the bills of lading on the shipments of the coal were also made out in their name, and that some time afterwards a notice, signed by S. and M., was given to the plaintiffs, complaining of the inferior quality of the coal, and claiming damages in consequence. In the latter part of the year 1868, S. repudiated the agreement to appropriate his dividends to the payment of coal, and refused to sign the receipts therefor in the plaintiffs' books. He had signed the receipt for the dividend of 1866. The present action was then brought (in 1873) against S. and M., the surviving partners of the Albertine Oil Company, McG. having died, to recover the value of the coal. S. shortly afterwards brought an action against the plaintiffs for the dividends; this latter claim was referred to arbitration and an award was made in favour of S. for upwards of \$15,000, which the plaintiffs paid in July, 1874. The receipt given for the payment stated that it was in full satisfaction of the judgment in the suit of S. against the Albert Mining Company, and it appeared (though evidence of this was objected to in the present action) that it included the dividends for the years 1867 and 1868. The learned judge before whom the action was tried, non-suited the plaintiffs, but the Supreme Court of Nova Scotia set aside the non-suit:—Held, (reversing the judgment of the court below) Strong, J., dissenting—That there being clear evidence of the appropriation of S.'s dividends in pursuance of agreement made with him, and therefore of the plaintiffs having been paid for the coal in the manner and on the terms agreed on, the plaintiffs were properly non-suited. *Spurr v. The Albert Mining Co.*, 9 S. C. R. 35.

### 3. When Property Passes to Buyer.

The plaintiff consigned crude oil to A., who was a refiner, on the express agreement that no property in the oil should pass until he made certain payments. Before making such payments, however, A. sold the oil to the defendants, without the knowledge of the plaintiff:—Held, affirming the judgment of the Court of Appeal for Ontario, 29 Chy. 300, that although the defendants were purchasers for value from A., in the belief that he was the owner and entitled to sell the oil in question, the plaintiff, under his agreement with A., having retained the property in the oil, and not having done anything to stop him from

maintaining his right of ownership, was entitled to recover from the purchasers the price of the oil. *Forristal v. McDonald*, 9 S. C. R. 12.

The plaintiffs sold to U & Co. certain wheels, &c., to be used in their manufactory under a written agreement, whereby it was stipulated that the right and property to the goods should not pass to them until the whole price thereof was paid, the right of possession merely passing; such right to be forfeited and the plaintiffs to be at liberty to resume possession in case of default in the payments being made, or in case of seizure for rent, &c., or upon any attempt by U. & Co. to sell or dispose thereof without the consent of the plaintiffs, it being expressly declared that the sale was conditional only, and punctual payment of the instalments being essential to its existence. U. & Co. placed the machinery in the flume belonging to their factory, which was held by them under a lease from H. & Co., and subsequently the sheriff having seized other chattels belonging to U. & Co., they surrendered the possession of the premises and delivered the key thereof to H. & Co. Default having been made by U. & Co., the plaintiffs demanded the wheels of H. & Co., which demand H. & Co. refused to comply with, assigning as a reason that they had not possession thereof, and in the following month the wheels were sold under proceedings to enforce payment of the liens of certain mechanics:—Held, affirming the judgment of the Common Pleas Division, 8 O. R. 465, that the plaintiffs were entitled to recover the value of the goods. *Joseph Tall Manufacturing Co. v. Hazlett et al.*, 11 A. R. 749.

An engine, boiler, and other machinery, were shipped by plaintiffs to the defendant E. under a written order to ship same to his address as per sum agreed on, viz., \$875; \$225 to be allowed for E.'s portable engine and boiler, and \$655 to be paid on shipment; but, if not settled for in cash or notes within twenty days, then the whole amount to become due. The order not to be countermanded, and until payment the machinery to be at E.'s risk, which he was to insure, and on demand was to assign the policy to the plaintiffs, and the title thereof was not to pass out of plaintiffs, E. agreeing not to sell or remove same without the plaintiffs' consent in writing. On default in payment the plaintiffs could enter and take and remove the machinery, and E. agreed to deliver same to plaintiffs in like good order and condition as received, save ordinary wear and tear, and to pay expenses of removal. Any notes or other security given by E. for his indebtedness to be collateral thereto. The machinery was put up in a mill on premises leased, with right to purchase, by defendant D. to E.'s wife for one or five years from 11th March, 1883. E.'s wife died on the 23rd October, 1883, and by her will appointed E. sole executor, giving him power to sell or dispose of any property to which testatrix was or might be entitled. E. by deed of 27th April, 1885, demised and released to D. all the right, title, and interest in the premises as well of himself as also as executor, together with the mill built thereon, with the boiler and engine, &c., and on the same day D. leased the said premises, mill and machinery, to E. for one year. After the execution of this lease D. mortgaged the land, mill and machinery to the defendants the F. Loan Society. The de-

fendant E. never paid any cash, but gave his promissory note at three months, which was renewed from time to time, but ultimately E. having failed to pay same, the plaintiffs demanded the machinery when D. notified plaintiffs not to remove same, as also did the society:—Held, that the effect of the transaction was, that the property was in the plaintiffs, and that they were entitled thereto: and that there was an illegal detention by the defendants D. and E. amounting to a conversion; and that the F. Loan Co. by having notified plaintiff not to remove the machinery, were proper parties to the suit to give plaintiffs full relief; and that unless defendants allowed plaintiffs to remove the machinery on demand, the plaintiffs were entitled to recover \$650 with interest, being the price of machinery, and that upon removal of the engine and boiler the sum of \$60 for repairs should be paid by plaintiffs to D. to be repaid to plaintiffs by E. *Polson et al. v. Degeer et al.*, 12 C. R. 275—C. P. D.

The plaintiffs were the owners of certain boats, docks, &c., and being desirous of giving up their business proposed to sell all their rights in their charter, boats, docks, &c., to a company to be thereafter incorporated as the "Thames River Navigation Company." The proposal was assented to by the defendants and others subscribing to the stock of the new company, and the purchase money was to be paid out of the funds of the latter when formed. Upon this understanding the vessels were delivered to the defendants on behalf of all parties, and the sum of \$3,500 on account of such purchase was paid out of the money paid in by persons subscribing for shares in the new company. Before the completion of repairs necessary to render the boats serviceable, one of them was destroyed by an unexpected flood, in consequence of which, proceedings for the incorporation of the new company were abandoned:—Held, reversing the judgment of the court below, that the defendants were not liable for the balance of the purchase money, as the circumstances showed there had never been a complete sale and purchase. The only contract proved, was a provisional one to take effect upon the incorporation of the new company, and the delivery which had taken place, was not in pursuance of a contract of sale, but simply to enable the repairs upon the vessels to be effected. *Thames Navigation Company (Limited) v. Reid et al.*, 13 A. R. 303.

See *Thomas v. Inglis et al.*, 7 O. R. 588, p. 270.

#### 4. Purchase by Sample and Inspection.

The defendants agreed with one W., who stated incorrectly that he was acting as broker for the plaintiff, for the purchase by sample of a quantity of cotton waste at 1½ cents per lb., to be delivered at St. Catharines. In reality W. was selling for his own benefit, as he arranged to purchase the waste at one cent a pound. Instead of inspecting the goods at St. Catharines the defendants requested W. to consign them to their house in Cincinnati, U. S., which the plaintiff did by direction of W. The plaintiff, at the request of W., made out a bill of lading in the name of the defendants and drew on them for the price at 1½ cents per lb., which draft was accepted by the defendants, the plaintiff paying



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*Polson et al. v. Deger*  
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### Example and Inspection.

d with one W., who was acting as broker in the purchase by sample of 100 lbs. of cotton at 1 1/2 cents per lb., to the firm of J. W. & Co., of Savannah, Ga. In reality W. consigned the cotton to the firm of J. W. & Co., at the rate of 10 cents a pound. In the goods at St. Catharines, W. to consign them to the firm of J. W. & Co., U. S., which the plaintiff, the defendant, at the time of the bill of lading in the goods, and drew on them for 100 lbs., which draft was assigned to the plaintiff paying

W. his profit in cash. On the goods reaching Cincinnati, an inspection took place when they were found greatly inferior to the sample. The defendants rejected the goods but refused to return them to the plaintiff at St. Catharines, although he was willing to accept them there. In an action on the bill of exchange :— Held, affirming the judgment of Senkler, Co. J., that the defect in quality formed no ground of defence, that the plaintiff's contract was to deliver the goods at St. Catharines, where the inspection ought prima facie to have taken place, and that the only redress of the defendants was by cross-action. *Towers v. Dominion Iron and Metal Company*, 11 A. R. 315.

The plaintiff, a fruit dealer in Ottawa, went to Montreal for the purpose of buying fruit where he met the defendant, who had a quantity of apples for sale. The defendant in answer to a question by one H., his agent, said they would be found to be "a good lot," and H. opened several barrels for the purpose of plaintiff examining the contents, which he did in five or six instances, when the apples "appeared to be good." The plaintiff might, had he so desired, have examined all the barrels; but having previously bought apples packed by the defendant which proved satisfactory, and placing reliance on the reputation of the defendant for being an honest packer, he refrained from any further examination, and purchased 138 barrels, which, on subsequently attempting to sell, proved to be so inferior in quality that parties refused to buy; others returning what they had bought. Thereupon the plaintiff instituted proceedings to recover compensation for the defect in value. The judge of the County Court withdrew the case from the jury, and entered a non-suit, which subsequently in term was set aside:—Held, on appeal, that as the sale was not a sale by sample, and the plaintiff had not been deterred by any acts or conduct of the defendant from making a full examination or inspection of all the barrels, the defendant was not liable on any warranty, expressed or implied, and that the maxim caveat emptor applied. *Borthwick v. Young*, 12 A. R. 671.

See *Leadlay v. McRoberts*, 13 A. R. 378, p. 609.

5. *Place of Delivery.*

The defendants agreed to sell to the plaintiff a quantity of tow, to be delivered in the United States at a "Boston point," that is, a point to which the freight charged was the same as to Boston, Mass. Both parties contemplated the route from the Suspension Bridge as that by which the tow would be sent, and Bellows' Falls, Vt., a Boston point on that railway system, was the place named by the plaintiff, but subsequently he desired to have the tow sent to Franklin, N. H., which was not a Boston point on that railway system, and he agreed to pay the arbitrary or extra freight, which he supposed was five cents per 100 pounds. The defendants accordingly consigned the goods to "Franklin, N. H.," and in the ordinary course of transport they were taken to Boston, and thence to Franklin, N. H., where they were received by the plaintiff subject to railway charges greatly exceeding the five cents per 100 pounds. It happened that Franklin was a Boston point upon

the lines of railway with which the Grand Trunk Railway connected at St. Albans, and the defendants had on one occasion shipped two car loads from stations of the Grand Trunk Railway by that route, but in consequence of delays at the St. Albans' custom house, the plaintiff wrote directing the defendants to ship by the Suspension Bridge:—Held, that by their contract the defendants were not bound to ship to Franklin, N. H., which was not a Boston point within the contract; and that under the circumstances the plaintiff, and not the defendants, was bound to pay the extra freight. The judgment of the Queen's Bench Division affirmed; that of the Common Pleas Division reversed. *Symmers v. Livingstone and Symmers v. Livingstone et al.*, 10 A. R. 355.

### 6. *Acceptance and Receipt.*

The defendant purchased from the plaintiff a car load of "No. 1 green hoops," to be delivered at the railway station. On their arrival at the station they were removed by the defendant to his own place and some of the hoops used by him, but merely, as he said, for the purpose of testing them. He then wrote to the plaintiff that he was astonished at his sending dry and rotten hoops for first class green hoops, and if he, defendant, had seen them before they were at his place he would not have touched them; that there were less in the car than the number stated by the plaintiff; that he enclosed a bill which was the amount he intended to pay, and not a cent more, because they were not worth that; and if the plaintiff would accept the amount offered to let the defendant know by return mail, and he would remit. In answer, the plaintiff, through his solicitor, threatened a suit, when the defendant replied that if plaintiff would not accept this he might go on and sue:—Held, there was evidence to go to the jury of an acceptance of the hoops, and an agreement to pay on a quantum meruit. *McClure v. Kreutziger*, 6 O. R. 480—C. P. D.

The plaintiff, a lumber dealer and mill owner, agreed with the defendant, who carried on a lumber business at Hamilton, to supply him with certain grades of lumber, to be shipped on board of cars at the stations nearest to the plaintiff's mills, and to be sent to the defendant at Hamilton; payment to be made by acceptance at three months from delivery. The lumber was shipped in car loads to the defendant from time to time, some of which were accepted and others rejected by him:—Held, that the defendant had the right of inspection at Hamilton, but having accepted certain of the car loads, he had no right to reject the others, because composed of lumber part of which did not answer the contract, unless such part was so inferior in quality and to such an amount as to destroy the distinctive character of the loads, which was not the case here, for out of the whole quantity delivered only four and a-half per cent was agreed to be defective; and that defendant must rely upon his action for damages, or give the inferiority in answer pro tanto to the claim. *Dyment v. Thomson*, 9 O. R. 566—C. P. D. Affirmed, 12 A. R. 659, p. 670.

Three cases of goods, exceeding \$40 in value, were verbally ordered by L. at M. from plaintiff

at T., through plaintiff's traveller, and were shipped, consigned to L., and carried by railway and then by defendant's steamer to M. Two of the cases were received by L., one of which was in a damaged condition. The third case remained on board the vessel, as the purser refused to deliver it up until the freight on these cases, as well as on a variety of other goods consigned to L., was paid, which L. refused to do until he had first an opportunity of checking over the goods. Before the dispute was settled the vessel left, and was subsequently wrecked and this case lost. An arrangement was made between plaintiff and L. whereby plaintiff allowed L. 25 per cent. on the value of the two cases received by L. The plaintiff then brought an action against the defendants to recover the 25 per cent. so allowed, and the value of the case lost:—Held, (Galt, J., dissenting,) that there was an acceptance and receipt of the goods by L. so as to pass the property therein to him; and therefore the act on should, under the Mercantile Amendment Act, R. S. O. c. 116, s. 5, subs. 1, have been maintained by him and not by plaintiff. Per Galt, J., the action was properly brought by plaintiff, as the property in the goods had not passed from him; and he was entitled to recover the 25 per cent. so allowed by him, as also the price of the case lost; for although the loss therefor was occasioned by the dangers of navigation, the defendants were not protected under 37 Vict. c. 25, (Dom.), the evidence shewing that the loss was by the fault or neglect of the defendants. *Friendly v. The Canada Transit Company*, 10 O. R. 756—C. P. D.

The plaintiff agreed to sell the defendant a piano for \$400, to be paid by notes at one and two years with interest, with a rebate for cash. The piano was delivered at defendant's residence, who after using it for some time objected to retain it, and refused to give the notes or pay the stipulated price. The plaintiff thereupon sued the defendant in the County Court, claiming the \$400 and interest. At the trial leave was given to strike out the words "with interest":—Held, that the amount was ascertained by the act of the parties, and that defendant having neglected to pay either by notes or cash the plaintiff was entitled to recover in an action for goods sold and delivered. *Greenizen v. Burns*, 13 A. R. 481.

Held, reversing the judgment of the court below, that in an action in the province of Quebec upon an unwritten commercial contract for the sale of goods exceeding the sum of \$50, oral evidence of acceptance or receipt of the whole or any part of the goods, is admissible, under Art. 1235 C. C. *Munn v. Berger*, 10 S. C. R. 512.

See *Leadlay v. McRoberts*, 13 A. R. 378, p. 609.

#### 7. Other Cases.

See *Hughes v. Moore et al.*, 11 A. R. 569, p. 240; *Page et al. v. Proctor*, 5 O. R. 238, p. 238.

#### III. RESCINDING CONTRACT.

The defendants contracted to purchase a quantity of old iron rails from the plaintiff company, to be paid for as each 100 tons were delivered. The plaintiffs consigned 1150 tons out of 1300

tons stipulated for, and drew for the amount thereof at the agreed price, which draft the defendants refused to accept under the erroneous belief that a portion of the iron charged for had not been received by them, and informed the plaintiff company of the ground of their refusal to accept the draft:—Held, affirming the judgment of the Q. B. D. 2 O. R. 1, that this refusal to accept was not, under the circumstances, such an act as to warrant the plaintiffs in treating it as a repudiation of the contract, or such as would release the plaintiffs from a further performance of it. What would amount to such a repudiation considered. *Midland Railway Company v. Ontario Rolling Mills*, 10 A. R. 677.

See *Brassett v. McEwan et al.*, 10 O. R. 179, *infra*.

#### IV. STOPPAGE IN TRANSITU.

Per Cameron, C. J., stoppage in transitu does not rescind a contract on the sale of goods, but merely gives the vendor a lien on the goods for their price. *Brassett v. McEwan et al.*, 10 O. R. 179—C. P. D.

The plaintiffs, merchants in Boston, sold and consigned goods to J. C. & Son, in Toronto. While the goods were held by the railway company in T., J. C. & Son assigned to the defendant as trustee for the benefit of creditors. The defendant, immediately after the assignment, passed and entered the goods, and paid the duty thereon, and the railway company removed the goods from the customs warehouse to their freight sheds, where they remained, and delivery was refused to the defendant for nonproduction by him of a bill of lading, and the freight was not paid or tendered. The plaintiffs having stopped the goods:—Held, that the transitus was not at an end, for that the railway company continued to hold the goods as carriers, and not as agents for the defendant. The plaintiffs had, before they stopped the goods in transitu, proved their claim for the goods on the estate of J. C. & Son:—Held, that this did not deprive them of their rights as lien holders, or affect their right to stop the goods in transitu. *The Morgan Envelope Company v. Boustead*, 7 O. R. 697—Q. B. D.

The plaintiff sold to G. a quantity of leather which was to be sent to the purchaser at P. by railway. The shipping bill contained, amongst others, the following conditions: "In all cases \* \* the delivery of goods will be considered complete and the responsibilities of the company shall terminate when the goods are placed in the company's shed or warehouse, \* \* when they shall have arrived at the place to be reached upon the railway of the company. The warehousing of them will be at the owner's risk, who was to be liable for any charges for storing them otherwise than in the warehouse of the company. "Storage will be charged on all freight remaining in the depots over forty-eight hours after its arrival." While the leather remained in the warehouse of the railway company at P., the purchaser requested the station agent that it might be kept for him by the company until he could find time to remove it, and asked him not to charge storage, but the agent made no promise; and subsequently the sheriff paid the charges thereon, seized the leather under a writ of attachment sued out by the defendants.

for the amount which draft the de- under the erroneous on charged for had and informed the and of their refusal affirming the judg- 1, that this refusal circumstances, such intiffs in treating it contract, or such as from a further per- amount to such a dland Railway Com- s, 10 A. R. 677.

et al., 10 O. R. 179,

#### TRANSITU.

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in Boston, sold and & Son, in Toronto. by the railway com- signed to the defen- tit of creditors. The ter the assignment. ls, and paid the duty company removed the ouse to their freight d, and delivery was for nonproduction by the freight was not intiffs having stopped r transitus was not at y company continued rs, and not as agents blaintiffs had, before r transitu, proved their estate of J. C. & Son: eprive them of their ect their right to stop he Morgan Envelope R. 697—Q. B. D.

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and removed the same from the stores of the railway company to the shop of G.:—Held, that this did not deprive the vendor of his right to stop the goods in transitu. *McLean v. Breithaupt et al.*, 12 A. R. 383.

#### V. PARTIES LIABLE.

Where one brought an action against the registered owners of a certain vessel for the value of goods supplied before they became such owners, not on the order of the defendants, but on the order of one G. C., between whom and the defendants no relation of agency was proved:—Held, that the plaintiff could not recover:—Held, also, that it was open to the defendants to show that their real interest was that of mortgagees, though ostensibly registered owners. The fact that the vessel got the benefit of the supplies and necessities did not make the registered owner liable. *Nelson v. Wigle*, 8 O. R. 82.—Boyd.

#### SALE OF LAND.

##### STATUTE OF FRAUDS.

1. *Note or Memorandum*, 618.
2. *Part Performance*, 619.

##### II. CONTRACT OF SALE.

1. *By Letters or Telegrams*—See CONTRACT.
2. *Construction*, 620.
3. *When Time of the Essence of the Contract*, 621.
4. *Delivery of Possession*, 621.
5. *Sale According to Plan*, 621.
6. *Description of Property.*
  - (a) *Compensation for Excess*, 622.
7. *Compensation to Purchaser for Breaches in Carrying out Contract*, 622.
8. *Covenants on Sale*—See COVENANT.
9. *Specific Performance of*—See SPECIFIC PERFORMANCE.

##### III. TITLE.

1. *Abstract*, 622.
2. *Incumbrances*, 623.
3. *Cloud on Title*, 623.
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7. *Covenants for Title*—See COVENANTS FOR TITLE.
8. *Applications under R. S. O. c. 109*—See VENDORS AND PURCHASERS ACT.

##### IV. VENDOR'S LIEN, 625.

##### V. RESCINDING AND SETTING ASIDE SALE FOR FRAUD—See FRAUD AND MISREPRESENTATION.

##### VI. CROWN LANDS—See CROWN LANDS.

##### VII. DOWER—See DOWER.

##### VIII. UNDER POWER OF SALE IN MORTGAGE—See MORTGAGE.

##### IX. MARRIED WOMAN'S PROPERTY—See HUSBAND AND WIFE.

##### X. UNDER ORDER OF THE COURT—See SALE OF LAND BY ORDER OF THE COURT.

##### XI. FOR TAXES—See ASSESSMENT AND TAXES.

##### XII. OF TIMBER—See TIMBER.

#### I. STATUTE OF FRAUDS.

##### 1. *Note or Memorandum.*

Per Proudfoot, J.—It being proved that the former will in this case was made pursuant to the agreement alleged, that will might be considered as evidence of the agreement, and was evidence in writing sufficient to satisfy the Statute of Frauds. *Campbell v. McKerricher et al.*, 6 O. R. 85.

At a tax sale of land, J. R. R. and T. A. K., finding there would be a contest between them for lots 1118 and 1119, signed an agreement, with their initials in the margin at the bottom of the page of the Gazette, containing the list of lands to be sold, as follows:

Mr. J. R. R.  $\frac{1}{2}$  } We buy on joint acct' { J. R. R.  
of 1118, 1119, sheriff's  
Mr. T. A. K.  $\frac{1}{2}$  } Nos. above. { T. A. K.

The sheriff's numbers had not been printed in the Gazette, but T. A. K. had prefixed them in ink to most of the parcels on that page of the Gazette, including Nos. 1118 and 1119. It was not stated anywhere in that list that these numbers were sheriff's numbers. J. R. R. having bid for the lots, and afterwards caused them to be conveyed to B., T. A. K. now brought this action against J. R. R. and B., claiming specific performance of the above agreement, and a declaration that J. R. R. and B. were trustees for him of an undivided moiety of the lands:—Held, affirming the decision of Proudfoot, J., that the above constituted a sufficient memorandum of the agreement within the Statute of Frauds. The manner of paying the amount of taxes, or by whom payment was to be made, was not one of the essentials of the contract as between the parties. The implication of law would be that whoever paid so as to complete the sale should have contribution of a moiety from the other:—Held, further, that the defendant appealing not having pleaded the defence of the statute, could not claim the benefit of it:—Held, also, that the above agreement was not illegal, nor did it make any difference that it was a tax sale. *Keefe v. Roaf et al.*, 8 O. R. 69.—Chy. D.

Where property was sold by auction, the particulars and conditions of sale not disclosing the vendor's name, and the contract was duly signed by the purchaser, but was not by the vendor or the auctioneer acting in the matter of sale, and subsequently, in consequence of delays on the part of the purchaser, the attorneys for the vendor (one of whom was the vendor himself) wrote in the course of a correspondence which ensued: "Re S.'s purchase, we would like to close this." And referring to certain representations made in the advertisements of the sale: "They were not made part of the contract of sale. \* \* \*

Have the goodness to let us know whether the vendee will pay cash or give mortgage. If the latter we will prepare it at once and send you draft for approval;" and on a subsequent occasion: "Re S.'s purchase. Herewith please receive deed for approval," and on another occasion the vendor himself wrote "I shall take immediate steps to enforce the contract."—Held, affirming the judgment of the courts below, (28 Chy. 207; 8 A. R. 161), that the conditions of sale together with the correspondence were sufficient to constitute a complete and perfect contract between the vendor and purchaser within the Statute of Frauds. *O'Donohoe v. Stammers*, 11 S. C. R. 358.

C. verbally agreed with an agent of W. at Toronto to buy land in Manitoba, paying the agent ten per cent. of the purchase money, and taking his receipt therefor. C. signed the receipt as a witness, made an affidavit of execution, and registered it, in order, as he swore, to bind the bargain. The vendor's name did not appear in the receipt, but there was a reference in it to a telegram sent to the vendor, which was produced and shown to be addressed to W. The plaintiff was the owner of the land, W. being merely his agent, but W. subsequently executed in his own name a conveyance of it to C., who also signed it:—Held, that the affidavit made by C., the receipt and the telegram could be read together, and when so read constituted evidence of a contract sufficient to satisfy the Statute of Frauds; and that the receipt could not be objected to as evidence because of a mistake in it as to the price, which was subsequently corrected in the deed:—Held, also, affirming the decision of Ferguson, J., 8 O. R. 316, that the deed executed by W. was sufficient to satisfy the statute, although ineffectual as a conveyance. *McCarthy v. Cooper et al.*, 12 A. R. 284.

## 2. Part Performance.

C. C., the plaintiff, alleged that A. C., his father, being the owner of certain land, induced him to abstain from enforcing a certain claim, and also to work on the land, by representing that he would devise the land to him, which he afterwards represented that he had done; and A. C. being dead, C. C. now claimed the land as against one to whom A. C. had devised it by a later will, revoking the former one. The execution of the former will was proved as alleged: Held, reversing the decision of Proudfoot, J., that this was not such part performance as to take the case out of the Statute of Frauds, for the execution of the former will was the act of the person whose estate it was sought to charge, and not of the person seeking to enforce the contract, and, moreover, did not import a contract, but only indicated a benevolent intention displayed by the testator in the execution of an instrument essentially of a revocable nature:—Quære, whether if it had been proved, which it had not, that A. C. had, by his representations that he had devised the land to C. C., induced him to forego his claim, and to work on the land as alleged, this would have entitled C. C. to succeed. *Campbell v. McKerricher et al.*, 6 O. R. 85—Chy. D.

To take a case of alleged contract concerning land out of the Statute of Frauds the acts of part

performance must be done by the party seeking to enforce the contract, and must be such as to manifest from their nature that there is some contract between the parties touching the land in question, and the proper order of marshalling the evidence in such cases is first to prove the part performance, and so let in parol evidence of the agreement sought to be enforced. *Maddison v. Alderson*, 8 App. Cas. 467, followed. *Ib.*

Where a person came into possession of real estate as tenant, and it was shewn unequivocally, viz., by part payment of the purchase money evidenced by the receipt in terms therefor, that his tenancy was afterwards relinquished, and that his possession, being changed in character by parol contract to purchase, was continued as that of a vendee:—Held, that the possession thus changed was such part performance as took the contract for sale out of the Statute of Frauds. *Magee v. Kane*, 9 O. R. 475—Chy. D.

## II. CONTRACT OF SALE.

### 2. Construction.

On 2nd May, 1882, the plaintiff by agreement under seal sold certain land to defendant for \$856, \$156 to be paid on the execution of the agreement and the balance without interest on 1st January, 1883, the defendant covenanting to pay accordingly; and in consideration thereof the plaintiff covenanted to convey or cause the land to be conveyed in fee simple to defendant, free from incumbrances, and to permit defendant to occupy same until default. By the agreement defendant also might assume possession, and might collect the rent then due from M., the tenant of the premises, and make arrangements with him for giving up possession. Defendant took possession, but was turned out by M., who claimed the land and registered a lis pendens against it. Defendant in April, 1883, recovered judgment in ejectment against M., when M.'s solicitors undertook to, and on 17th October, 1883, did remove the lis pendens. In an action brought by plaintiff on October 12th, 1883, for the recovery of the purchase money:—Held, (per Cameron, C. J.) following *McDonald v. Murray*, 2 O. R. 573, that shewing a good title was not a condition precedent to the recovery of the purchase money; and moreover the plaintiff's covenant was to convey or cause to be conveyed. Per Rose, J., that apart from *McDonald v. Murray*, the plaintiff was entitled to recover, for as the judgment in the ejectment action disposed of defendant's claim to the land, the existence of the lis pendens, which could be removed for \$5 or \$10, was no answer to the plaintiff's claim. The defendant also counter-claimed, setting up an agreement by plaintiff to pay the ejectment costs; and also claiming damages for being kept out of possession:—Held, that to entitle the defendant to recover these costs an unqualified promise to pay should be shewn, which the evidence failed to do; but as plaintiff admitted he intended to pay a portion of them he was charged with half; and he was disallowed interest for the time defendant was kept out of possession. *McCrae v. Backer*, 9 O. R. 1—C. P. D.

On the 7th December, 1874, T. G., by a promise of sale, agreed to sell a farm to D. M.

y the party seeking must be such as to at there is some con- touching the land in or of marshalling the at to prove the part or evidence of the recd. Maddison v. followed. *Ib.*

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OF SALE.

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1874, T. G., by a pro- ell a farm to D. M.

then a minor, for \$1,200—of which \$500 were paid at the time, balance payable in seven yearly instalments of \$100 each, with interest at seven per cent. D. M. was to have immediate possession and to ratify the deed on becoming of age, and to be entitled to a deed of sale if instalments were paid as they became due, "but if, on the contrary, D. M. fails, neglects, or refuses to make such payments when they come due, then said D. M. will forfeit all right he has by these presents to obtain a deed of sale of said herein mentioned farm, and he will moreover forfeit all moneys already paid, and which hereafter may be paid, which said moneys will be considered as rent of said farm, and these presents will then be considered as null and void, and the parties will be considered as lessor and lessee." After D. M. became of age he left the country without ratifying the promise of sale, he paid none of the instalments which became due, and in 1879 T. G. regained possession of the farm. In October, 1880, D. M. returned and tendered the balance of the price, and claimed the farm:—Held, reversing the judgment of the court below, 3 Dorion's Q. B. R. 212, (Strong and Taschereau, JJ., dissenting,) that the condition precedent on which the promise of sale was made not having been complied with within the time specified in the contract, the contract and the law placed the plaintiff en demeure, and there was no necessity for any demand, the necessity for a demand being inconsistent with the terms of the contract, which immediately, on the failure of the performance of the condition, ipso facto changed the relation of the parties from vendor and vendee to lessor and lessee. *Grange v. McLennan*, 9 S. C. R. 385.

See *Keefer v. Roaf et al.*, 8 O. R. 69, p. 618.

### 3. When Time of the Essence of the Contract.

See *Crossfield v. Gould*, 9 A. R. 218, p. 657.

### 4. Delivery of Possession.

See *McCrae v. Backer*, 9 O. R. 1, p. 620; *Keays v. Enard et al.*, 10 O. R. 314, p. 237; *Manson v. Manson*, 10 P. R. 155, p. 626; *Barber v. Barber*, 11 P. R. 137, p. 627.

### 5. Sale According to Plan.

The mere fact of the owner of lands selling them in lots according to a plan shewing streets and lanes adjoining the several lots does not bind him to continue such streets and lanes, unless a purchaser is materially inconvenienced by the closing of any of them. The defendants, the city of Toronto, announced a sale by auction of city lots, the advertisement stating that "lanes run in rear of the several lots." A plan of the land shewing the streets and lanes was exhibited at the sale, and was incorporated in the contracts of purchase. At such sale the plaintiff purchased a lot situate on the north side of Baldwin street, which lot abutted on a lane running from east to west; a lane also ran in rear of other lots situate on Huron street, all of which were bought by the defendant M., such lane joining at right angles the lane in rear of the plaintiff's lot. The lane in rear of the lots on Huron street was subsequently closed:—Held, reversing the judgment

of Ferguson, J., 7 O. R. 194, that, as the plaintiff had ready access to the streets by the lane on which his lot abutted, he could not prevent the city from closing up other lanes on the property. *Carey v. The City of Toronto*, 11 A. R. 416. Affirmed by Supreme Court. See Cassell's Digest, p. 482.

In 1859 the then owners of part of the lands in question in this case had a plan prepared and registered, and in 1871 they conveyed a parcel which they described as block F.:—Held, that it must be presumed they intended to convey the same parcel of land shewn on said plan as block F. with the same natural boundaries as those thereon indicated. *Attrill v. Platt*, 10 S. C. R. 425.

### 6. Description of Property.

#### (a) Compensation for Excess.

In proceeding to a sale of lands under a decree of the Court of Chancery in 1876, one parcel was advertised as containing 100 acres, and was bid off by one A. at \$31 per acre, which in the agreement to purchase signed by A., as well as in the conveyance to him, was described as "100 acres more or less, composed of the east part of lot 9," &c.: he paying or securing according to the conditions of sale, the sum of \$3,100. In reality the portion so sold contained 124 acres and sixty-eight one-hundredths of an acre, a fact neither party to the transaction was aware of. There was no provision in the conditions of sale for compensation. The purchaser became aware that there was an excess on the same day, immediately after the sale, but the vendors not until long afterwards, though before the execution of the conveyance. In the report on sale several of the sales were referred to as at so much per acre, while the one in question was mentioned as a sale at a bulk sum of \$3,100. After the conveyance to A. he had been obliged to take proceedings against G. T., the person who had conveyed the land in question to the father of the vendors, to obtain possession of the portion in dispute and which he succeeded in obtaining. The vendors, however, refused to interpose in such proceedings or assist A. in any way in such litigation:—Held, (reversing the judgment of Ferguson, J., 5 O. R. 704), that the sum of \$3,100 was bid for the whole parcel; that the sale being a sale in bulk, and there being no provision in the conditions of sale for compensation, there could be no rectification after the execution of the conveyance, nor could there have been, under the circumstances of the case, a rescission of the contract, had such relief been asked for. There was no mistake as to what was intended to be sold, or in the price intended to be paid for it. *Patterson, J. A.*, dissenting. *Cottingham et al. v. Cottingham et al.*, 11 A. R. 624.

### 7. Compensation to Purchaser for Breaches in Carrying out Contract.

See *Imperial Bank of Canada v. Metcalfe*, 11 O. R. 467, p. 654; *Manson v. Manson*, 10 P. R. 155, p. 626; *Barber v. Barber*, 11 P. R. 137, p. 627.

### III. TITLE.

#### 1. Abstract.

B. agreed to sell certain land to W., and in the agreement it was provided that "the examina-



tion of title to be at the expense of the purchaser who is to call for only those deeds and papers in my possession or under my control." W. demanded a solicitor's abstract which B. declined to furnish; and on the examination of the title it was discovered that a deed was missing which had not been registered, so that a clear paper title could not be made out. B. then offered evidence of a title by possession by declarations under 37 Vict. c. 37, (Dom.), which W. declined to accept:—Held, on an application under the Vendors and Purchasers Act, R. S. O. c. 109, s. 3, that B. was bound to furnish an abstract, and that W. was not bound to accept declaration evidence of the title by possession, and the vendor was directed to obtain affidavits from the declarants, when the purchaser could cross-examine the deponents, and if not satisfied with that, although he might be thought unreasonable, the purchaser was entitled to have the evidence taken viva voce, and have his title sanctioned by a decree, in which case, and for that purpose leave was given to him to institute a suit for specific performance, all costs of which were reserved until the hearing. *Re Boustead and Warwick*, 12 O. R. 488.—Proudfoot.

### 2. Incumbrances.

Cain agreed to sell lands to Carter for \$1,400, payable in yearly instalments of \$100 each, with interest, and covenanted that on payment he would convey to Carter in fee simple, free from incumbrances. There was, at the time of this agreement, a mortgage on the property still in force, payable some years before the last instalment of purchase money. C. & C., to whom Cain had assigned the agreement, now sued Carter for certain instalments overdue:—Held, reversing the decision of Proudfoot, J., that C. & C. were bound to ensure the defendant, in making the intermediate payments, that he, the defendant, would have a good title, clear of incumbrances, when the period of completion of the contract had arrived. *Cameron et al. v. Carter et al.*, 9 O. R. 426.—Chy. D.

Held, as to the alleged misrepresentation, that it was not such as would avoid the contract, but it would cast it upon the vendor to make good his representation before he could compel the payment of the purchase money. But, in any event, a purchaser of land has a right to assume that the title is good, and that it is free from incumbrance, and to require this to be shown before he can be compelled to pay any part of his purchase money. *Gamble v. Gummerson*, 9 Chy. 199, approved of. *Ib.*

### 3. Cloud on Title.

The registration of any instrument which casts doubt or suspicion on the title, or which embarrasses the owner in maintaining his estate, or in disposing of his property, is a cloud upon the title against which the courts will relieve. And in such case it is sufficient if there is a registered instrument apparently valid on its face, accompanied by a claim of title, although an intruder on the claim of title, which is likely to work mischief to the real owner. A purchaser at a sale of lands held under an order of court objected to the title on the ground that four deeds had been

registered against half of the lot by parties who apparently had no title, but one of whom had notified the purchaser that he claimed some interest in the lands:—Held, that such registered deeds were clouds upon the title, and that the purchaser could not be compelled to take it. *Keefer v. McKay*, 10 P. R. 345.—Hodgins, *Master in Ordinary*.

See *Hamilton Provident Loan Society v. Gilbert*, 6 O. R. 434, p. 275.

### 4. Costs.

The ordinary rule in a vendor's suit, is, that the costs are given against him up to the time when he has first shown a good title; but where the question as to title is not the chief matter in dispute the costs will follow the result. *Laird v. Paton*, 7 O. R. 137.—Proudfoot.

Where a purchaser's objections to the title have caused the litigation and have been overruled, he will be liable for costs, notwithstanding any decision in his favour on particular points in dispute. *Ib.*

### 5. Other Cases.

On a reference as to title under a judgment which contained this clause: "And in case a good title can be made an enquiry when it was first shown that such good title could be made." It was:—Held, that these words meant when was a good title first shown upon the abstract. *Laird v. Paton*, 7 O. R. 137.—Proudfoot.

Held, also, that a vendor does not complete his title until his deed is registered; i. e., that registration is essential to the title. *Ib.*

A purchaser becomes liable to pay interest, when no time is fixed by the contract, from the time when he could prudently take possession, and in the case of the purchase of several properties under an indivisible contract he cannot prudently take possession until the title to the whole is made. *Ib.*

When the price is payable by instalments, the purchaser of land has a right to have a reference as to title, and to have title manifested before he makes a single payment. *Cameron et al. v. Carter et al.*, 9 O. R. 426.—Chy. D.

By an agreement for the sale of certain land, the vendor was to give a good marketable title of which the purchaser was to satisfy himself at his own expense, and was not to call for any abstract of title, deeds or evidences of title other than those in the vendor's possession. Subsequently on a reference in a suit by the vendor for specific performance, the defendant filed three objections to the title having reference to a small portion of the land, which were answered by the plaintiff, and the reference was proceeding when the defendant applied and obtained from the master leave to file other objections. On appeal, Proudfoot, J.:—Held, that the master in ordinary had no jurisdiction to grant such leave, but on a subsequent application to the court he gave the leave required on terms. *Clarke v. Langley*, 10 P. R. 208.—Hodgins, *Master in Ordinary*—Proudfoot.

By a contract for the sale and purchase of land the vendee agreed to pay \$4,000, part of the



lot by parties who one of whom had claimed some interest in such registered title, and that the defendant was compelled to take it. 15.—Hodgins, Mas.

*Loan Society v. Gil-*

endor's suit, is, that him up to the time of title; but where the chief matter in the result. *Laird and foot.*

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le and purchase of y \$4,000, part of the

purchase money, on the execution of the agreement (which was paid accordingly) and an additional portion of the purchase money was to be paid within sixty days thereafter, the balance remaining out on mortgage. After the expiration of the sixty days the vendor instituted proceedings to recover the amount agreed to be then paid, and at the trial, Cameron, J., directed judgment to be entered for the defendants with liberty to the plaintiff to bring a fresh action which, by an order of the Divisional Court, was set aside, (3 O. R. 573.) On appeal, this court (Hagarty, C. J. O., dissenting) discharged that order, with costs. Per Burton and Patterson, J.J. A.—The agreement to convey the lands, and that to pay the money at the expiration of sixty days were not mutual but dependent, so that the vendor before being entitled to recover the purchase money must show that he was ready, willing and able to convey; and that the purchaser, until he did so, could not be called on to pay his money and rely on the ability of the vendor to convey the estate, or in the event of his being unable to do so, look to him for re-payment. Per Rose, J.—Without determining that point expressly, the neglect and delay of the vendor to take the necessary steps to show his title to the lands, part of which the vendor admitted was vested in one Y., were such as disentitled him to call for payment, and therefore that the finding of the judge at the trial was correct. *McDonald v. Murray et al.*, 11 A. R. 101.

See *McCrae v. Backer*, 9 O. R. 1, p. 620; *Imperial Bank of Canada v. Metcalfe*, 11 O. R. 467, p. 657.

#### IV. VENDOR'S LIEN.

W. S., being indebted to R. & Co., who held a saw mill and timber license, &c., belonging to W. S. in their own name, as security therefor, wrote to them that he had arranged with his son W. A. S. for the transfer to him of his business, and upon his arranging with R. & Co. the liability of W. S. that W. A. S. was entitled to be placed in the position of W. S. with respect to the property held by R. & Co., and that on settling that liability they were to convey to W. A. S. By a subsequent agreement W. S. agreed with W. A. S. that the latter was to pay off the liabilities of W. S. in two years, upon which W. S. was to transfer to him other lands than those held by R. & Co. Subsequent advances were made by R. & Co. to W. A. S. The defendant B. afterwards paid off R. & Co., and R. & Co. and W. A. S. joined in conveying the property in question to the defendant B., who subsequently made advances to W. A. S. and to his assignee, on his becoming insolvent. To some of these advances the plaintiffs, the executors of W. S., agreed by instrument under seal, stipulating that it should not affect their lien as against any one but the defendant B. They then claimed a lien on the lands for the amount of the liabilities of their testator W. S., which W. A. S. had agreed to pay as the consideration for the transfer to him of the business:—Held, affirming the judgment of Galt, J., (Cameron, J., dissenting,) that no such lien existed, even if the defendant had had notice of the transaction between W. S. and W. A. S. *Scott v. Benedict*, 5 O. R. 1—Q. B. D.

On the occasion of the defendant effecting a purchase of land from one H., against whom the plaintiff had a claim for money advanced to effect the original purchase jointly by H. and himself, and in the conveyance of a portion of which he refused to join until assured by his solicitor, with defendant's assent, that part of the purchase money would be paid to the solicitor, out of which the solicitor agreed to pay the amount due the plaintiff, whereupon the plaintiff joined in the conveyance to the defendant, which was duly registered. The defendant and H. however made other arrangements for discharging all the purchase money, no portion of which was paid to the solicitor or the plaintiff:—Held, affirming the judgment of Proudfoot, J., that under the circumstances an equitable assignment had been made of so much of the purchase money as the plaintiff's demand amounted to, and for which purchase money H. had a vendor's lien; and that the defendant was bound to pay the same to the plaintiff. (Burton, J. A., dissenting.) *Armstrong v. Farr*, 11 A. R. 186.

For compensation for lands taken by railway company. See *Ross v. Grand Trunk R. W. Co.*, 10 O. R. 447, p. 577.

#### SALE OF LAND BY ORDER OF THE COURT.

I. ADVERTISEMENT AND CONDITIONS OF SALE, 626.

II. PAYMENT OF DEPOSIT, 627.

III. TITLE, 627.

IV. INFANTS' ESTATE, 627.

#### I. ADVERTISEMENT AND CONDITIONS OF SALE.

At a judicial sale of a farm, the conditions of sale were the usual conditions of the court, providing for the delivery of possession to the purchaser upon payment of the balance of the purchase money one month after the sale. The purchaser lived upon a part of the lot which was not sold, and was aware that the farm sold was occupied by a tenant, but swore that he did not know the terms of the tenancy, that he relied upon the conditions of sale, and that he bid more for the land because there were growing crops thereon. The purchaser paid the balance into court at the proper time, but did not get possession then, nor had he got possession at the time of this application, January 7th, 1884:—Held, that the vendors were bound by the terms of the printed and published conditions of sale, and that it was not the business of the purchaser to acquaint himself with the terms of the tenancy, and by enquiry to ascertain whose were the crops. Order made for possession, with a reference as to compensation. *Manson v. Manson*, 10 P. R. 155.—Boyd.

The advertisement of a judicial sale stated that the property was in possession of a tenant, who would permit the purchaser to obtain possession on the 1st of November. The purchaser, however, was prevented by the tenant from taking possession till the month of January following. About the middle of November the purchaser obtained a vesting order:—Held, that the

purchaser was entitled to compensation from the vendor for being kept out of possession, and that he had not waived his right by taking a vesting order. The failure to give possession was a breach of the representation in the advertisement, a representation on account of which it was to be assumed that the purchase money was greater than it would otherwise have been. *Barber v. Barber*, 11 P. R. 137.—Ferguson.

## II. PAYMENT OF DEPOSIT.

Where the plaintiff's solicitor made default in payment into court of the ten per cent. paid to him at the time of sale, under the conditions of sale:—Held, that the other parties entitled to the purchase money should not suffer thereby, but that the plaintiff's share should be charged with the deficiency. *Mulkins v. Clarke*, 11 P. R. 350.—Proudfoot.

## III. TITLE.

Cloud on. See *Keefer v. McKay*, 10 P. R. 345, p. 624.

## IV. INFANTS' ESTATE.

See *Blean v. Blean*, 10 O. R. 693, p. 322.

## SALOONS.

See INTOXICATING LIQUORS.

## SALVAGE.

See INSURANCE—SHIP.

## SAMPLE.

SALE BY.—See SALE OF GOODS.

## SCHOOLS.

See PUBLIC SCHOOLS.

## SCIRE FACIAS AND REVIVOR.

S. P. brought an action for damages sustained and to be sustained by reason of breaches of covenants for title in a conveyance of certain lands to him, and before the trial died intestate, whereupon his administratrix took out an order of revivor, which order was now sought to be set aside on the ground that the right of action did not survive to her:—Held, that as to damages which accrued during the lifetime of S. P., his administratrix was entitled to sue for the same; but that this was not so as to damages which might have accrued since his death, for which—Semble, the heir, or devisee, might bring an action. In the case of such covenants run-

ning with the land where only a formal breach takes place in the life of the ancestor, the remedy for damages accruing after his death, passes to the heir or devisee; but where not only the breach took place, but damages accrued in the lifetime of the ancestor, the remedy for these damages passes to the personal representative. *Platt v. The Grand Trunk R. W. Co.*, 11 O. R. 246.—Proudfoot.

The original defendant dying pendente lite, the plaintiffs issued an order of revivor on the 22nd April, and served it on the defendants by order on the same day, and along with it a notice of trial for the 5th May, at Cornwall. The defendant moved to set aside the notice of trial as irregular:—Held, that the order of revivor was in force from its service, and as it would be confirmed by the lapse of twelve days upon the 4th of May, the notice of trial for the 5th of May was regular. *New York Piano Co. v. Stevenson*, 10 P. R. 270.—Dalton, Master.

The letters of administration to an infant as administrator were revoked after judgment against him in an action brought by him to recover certain assets of the estate, and new letters were granted to one P., who thereupon obtained an order of revivor in such action, directing the further proceedings to be carried on by P. as administrator and plaintiff. Before P. could move against the judgment the order of revivor was rescinded. P. in this administration action attacked the validity of the securities which the former administrator had impeached in the action referred to, whereupon the plaintiffs (who had been defendants in that action) applied to have it ruled that the judgment in such other action was res judicata against P. in this administration proceeding:—Held, that by the discharge of the order of revivor in the action, in which the plaintiff by revivor was suing in autre droit, such action was left without a plaintiff and the judgment recovered was not under the circumstances an estoppel against P. *Merchants' Bank v. Monteith*, 10 P. R. 467.—Hodgins, Master in Ordinary.

Judgment was recovered in 1856. On the 23rd of October, 1869, an order was made by a Judge in Chambers to revive by entering a suggestion on the roll under the C. L. P. Act, and the suggestion was entered on the 22nd January 1870, but no execution issued after that date. On the 6th December, 1884, an order was made under Rule 255, O. J. Act, for leave to the plaintiff to issue execution:—Held, that the entry of a suggestion under the C. L. P. Act was a judgment of the court and gave a new starting point for the Statute of Limitations to run from, and that the period of limitation in the case of judgments in personal actions is twenty years under R. S. O. c. 61, and not ten years under R. S. O. c. 125, which relates to judgments as liens on land. *Allan v. McTavish*, 2 A. R. 278, and *Boice v. O'Loane*, 3 A. R. 167, commented on and followed:—Quare, per Rose, J., whether there is any period fixed by the statute beyond which the court may not have power to allow execution to be issued. *McCullough v. Sykes et al.*, 11 P. R. 337.—Dalton, Master.—Rose.

The plaintiff recovered judgment against the defendants on the 3rd of November, 1863, and the last execution issued thereon was returned in September, 1865. More than twenty years

ly a formal breach of contract, the remedy in his death, passes to the estate, where not only the damages accrued in the estate, but the remedy for these damages passes to the personal representative.

*R. W. Co., 11 O. R.*

ing pendente lite. The order of revivor on the part of the defendants is along with it a notice of trial, and as it would be twelve days upon the trial for the 5th of May.

ation to an infant, and after judgment was brought by him to restate, and new letters to thereupon obtained an action, directing the order of revivor, and as it would be twelve days upon the trial for the 5th of May.

d in 1856. On the order was made by a judge by entering a suggestion. The C. L. P. Act, and on the 22nd January, an order was made for leave to the plaintiff, that the entry of the C. L. P. Act was a judgment, a new starting point to run from, and in the case of judgment twenty years under R. S. O. judgments as liens on, 2 A. R. 278, and 167, commented on by Rose, J., whether the statute beyond have power to allow *McCullough v. Sykes & Master.*—Rose.

judgment against the defendant, November, 1863, and hereon was returned more than twenty years

afterwards the plaintiff moved for leave to issue execution against the surviving defendant, but no evidence was given of any part payment on account of the judgment or acknowledgment of liability thereon within that period:—Held, that if the motion was necessary it had been rightly refused:—*Quære*, whether it was necessary to obtain leave to issue execution upon, or to revive the judgment, execution having been in fact issued and returned within six years from its recovery. *Allan v. McTavish*, 2 A. R. 278; *Boice v. O'Loane*, 3 A. R. 167, commented on. *McMahon v. Spencer*, 13 A. R. 430.

See *Grasett v. Carter*, 6 O. R. 584, p. 329.

### SCOTT ACT.

See INTOXICATING LIQUORS.

### SEAL.

Where the directors of a company had power to appoint officers and agents and dismiss them at pleasure:—Held, that their appointment of a solicitor need not be under the corporate seal. *Clarke v. Union Fire Ins. Co.—Caston's Case*, 10 P. R. 339.—Hodgins, Master in Ordinary.

See *The Canada Central R. W. Co. v. Murray*, 88 C. R. 313, p. 118.

### SEARCH WARRANT.

Held, that an action for malicious prosecution will lie for issuing a search warrant without reasonable and probable cause. *Young v. Nichol*, 90 R. 347—C. P. D.

Before any complaint or charge was made against the defendant for unlawfully keeping for sale intoxicating liquor, &c., contrary to the Canada Temperance Act, 1878, a search warrant was issued and executed, and evidence obtained upon his premises, under which he was convicted:—Held, that a search warrant under the Act is a proceeding to sustain a charge made for an offence committed against the Act, and not a proceeding taken upon which to found a charge to be made in case liquor is found on the premises:—Held, however, that although the search warrant was illegally issued the evidence obtained under it was admissible against the defendant. *Regina v. Doyle*, 12 O. R. 347.—Wilson.

See *Hoover v. Craig et al.*, 12 A. R. 72, p. 602.

### SECURITY.

I. COLLATERAL.—See COLLATERAL SECURITY.

II. FOR COSTS.—See COSTS—SOLICITOR.

### SEDUCTION.

I. RIGHT OF ACTION, 630.

II. EVIDENCE, 630.

### III. DAMAGES, 631.

### IV. COSTS, 631.

#### I. RIGHT OF ACTION.

In an action for seduction of the grandniece of the plaintiff, it appeared that on her father's and mother's death, when she was about twelve years old, she went to live with the plaintiff, and from thence went out to service to various persons, and at the time of the seduction, and for three years previously, was in the service of one C. retaining her wages for her own use. She was seduced by the defendant in the month of April, being then about nineteen years old. In June following she went to Detroit for a couple of weeks, and from thence to the plaintiff's, where she resided until she was sick, when she went to the hospital, where she was confined. While at the plaintiff's she worked, and did whatever was required of her, the plaintiff treating her as if she were at home; as her guardian:—Held, that the plaintiff could not recover, for that the right of action for the alleged wrong was not vested in the plaintiff, but in the person who was master of the girl at the time of her seduction. *McKersie v. McLean*, 6 O. R. 428.—C. P. D.

See *Udy v. Stewart*, 10 O. R. 591, *infra*.

#### II. EVIDENCE.

In an action of seduction the plaintiff obtained a verdict, and judgment was directed to be entered in his favour. In the following sittings of the Divisional Court an order nisi was obtained to set aside the verdict and judgment, and to enter judgment for the defendant, on the ground of the improper admission of the evidence of the seduced girl by reason of her incompetency to give evidence. The order was set down, and on its coming on for judgment, it appeared that after the order had been served the plaintiff had died:—Semble, that under O. J. Act, Rule 383, the action abated by reason of the plaintiff's death:—Held, that the girl's evidence was improperly received, as it clearly appeared that she was not capable of understanding or appreciating the nature of an oath or the obligation she assumed in swearing to tell the truth, and was therefore incompetent to give evidence; and without her evidence the verdict could not be supported. Under the circumstances an order was granted staying further proceedings in the action. *Udy v. Stewart*, 10 O. R. 591—C. P. D.

In an action of seduction the only evidence was that of the plaintiff, the father of the seduced girl, and the defendant, the girl having died shortly after the birth of the child. The plaintiff stated that the defendant had admitted that he had seduced the girl, and asked what the case could be settled for. The defendant denied that he was the father of the child, or that he had made any such admission: that he had heard L. spoken of as the father of the child. He admitted having asked what the case could be settled for, but that he said so because he heard the plaintiff was asking \$1,000, and he wished to know what it could be settled for: that he did not do so with a view to any one but merely out of curiosity. The jury found for the plaintiff

with \$750:—Held, that there was sufficient evidence to go the jury in support of the plaintiff's case; and that the damages, under the circumstances, were not excessive. *Palnby v. McCleury*, 12 O. R. 192—C. P. D.

### III. DAMAGES.

Assessment of damages by judge without jury. See *Adair v. Wade*, 9 O. R. 15, p. 682.

See *Palnby v. McCleury*, 12 O. R. 192, *supra*.

### IV. COSTS.

In an action for seduction it appeared that the wrong complained of was partly attributable to the culpable conduct of the girl's parents, and the jury gave a verdict for the defendant, but declared that they desired him not to get the costs, whereupon judgment was directed to be entered for him without costs:—Held, that good cause was shown why costs should not be given to the defendant within Rule 428, which declares that where an action is tried by a jury the costs shall follow the event, unless upon application made at the trial, for good cause shewn, the judge or court shall otherwise order. *Walmsley v. Mitchell*, 5 O. R. 427—C. P. D.

### SEQUESTRATION.

Where an injunction is ordered at the hearing of a cause and the parties enjoined give the security required by R. S. O. c. 38, s. 26, pending an appeal to the Court of Appeal, all proceedings to enforce the injunction are by virtue of sec. 27 of that Act thereupon stayed, and a writ of sequestration cannot therefore be obtained pending the appeal on the ground of non-compliance with the injunction. *Dundas v. Hamilton & Milton Road Company*, 19 Chy. 455 followed, and preferred to *McLaren v. Caldwell*, 29 Chy. 438. *McGarvey v. The Corporation of the Town of Strathroy*, 6 O. R. 138.—Proudfoot.

The plaintiffs, having recovered a judgment against the defendants for a large sum, obtained an order from a Judge in Chambers ordering defendants to pay the amount due upon such judgment to the sheriff, to whom executions had issued against defendants' goods, or to the plaintiffs, by a day certain, and in default that a writ of sequestration should issue. Default having been made a writ of sequestration issued accordingly:—Held, that though the writ could not have issued to enforce the judgment, which was for the payment of money, without limiting a time certain, yet that the judge's order was a judgment for disobedience of which the writ might issue, and that the writ was regularly issued. *London and Canadian Loan and Agency Co. v. Morphy et al.*, 10 O. R. 86.—Wilson.

Defendants were members of the Toronto Stock Exchange (a corporation), and had seats at the Stock board thereof, shown to be of considerable value, and to be saleable by the defendants on compliance by them with certain by-laws of the corporation, which, among other things, provided for a written application to the Exchange by any member wishing to sell his

seat, for leave to sell, submitting at the same time the name of the proposed purchaser, and if the purchaser was in such a case acceptable, or had theretofore been accepted, the leave would be granted. A party desiring to become a member of the Stock Exchange could not, under the by-laws, be admitted a member unless he had been previously a stock broker, resident, doing business publicly as such, in Toronto, for at least six months previously to his application, and had upon his own application been accepted by the Exchange as a member, the vote for his acceptance to be by ballot, and one black ball in five, or a portion of five, to exclude. After being accepted he might purchase a seat from some one already a member, or pay an entrance fee of \$4,000 to the Exchange, and by such payment create a seat for himself. The total number of seats on the board was limited to 40, whereof 33 were taken up by the 33 members of the Exchange. The sequestrator having applied for an order under the writ of sequestration to sell the defendants' seat at the Exchange:—Held, that although such seats were the property of the debtor and should be saleable under process, and that the court could implement its execution by ordering the defendants to do any act necessary to effect, or to refrain from any act to obstruct, the sale of the said seats; yet that, inasmuch as the court could not control the exercise of the ballot by the members of the Exchange, no effectual order for sale of the seats could be made: the application was, therefore, refused, without costs. Remarks on the desirability of legislation to extend the operation of the writ of sequestration to meet such cases. *Id.*

Attachment not sequestration is the proper remedy for disobeying a mandamus. *Demorest v. Midland R. W. Co.*, 10 P. R. 82.—Wilson.

### SERVANT.

See MASTER AND SERVANT.

### SERVICE OF PAPERS.

See PRACTICE.

### SESSIONS.

#### I. WHO TO PRESIDE, 632.

#### II. CONVICTIONS.

1. *Appeals from Magistrates*, 633.
2. *Appeals from Sessions*, 633.

#### I. WHO TO PRESIDE.

Held, per Armour and O'Connor, JJ., that the County Judge of the county of Lanark had no power to preside at the Sessions in the county of Renfrew, the Provincial Statute authorizing him to do so being *ultra vires*. Wilson C. J., upon this point gave no positive opinion, but inclined to the opposite view. *Gibson v. McDonald*, 7 O. R. 401.—Q. B. D.

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## II. CONVICTIONS.

### 1. Appeals from Magistrates.

Two justices appointed in 1880 for the temporary judicial district of Nipissing, made a conviction in the said district of one M. for an assault committed there:—Held, that no appeal would lie under 9 Vict., c. 41, now Consol. Stat. C. c. 101, s. 4, to the General Sessions of the county of Renfrew, being the nearest to the place of conviction, for the justices were not appointed under that Act, but under the R. S. O. c. 71, and the place of conviction was not within any part of Canada defined and declared by proclamation under that Act. *Gibson v. McDonald*, 70 R. 401.—Q. B. D.

On the conviction of the prisoner herein she was committed to custody under a warrant issued by the convicting magistrate. She gave bail and was discharged from custody under 33 Vict. c. 27, s. 1. On the appeal being heard, the prisoner was found guilty and the conviction affirmed, and the prisoner directed to be punished according to the conviction. No process was issued by the Sessions for enforcing the judgment of the Court, but a new warrant was issued by the convicting magistrate, under which the prisoner was retaken. Writs of habeas corpus and certiorari were issued, and on the return thereof a motion was made for the discharge of the prisoner. In the margin of the writ of habeas corpus, it was marked "per" 33 Car. 2, which was signed by the Judge issuing it:—Held, that the prisoner was not in custody or confined under the judgment of the Sessions, but under the warrant of the convicting magistrate; and—Semble, under the circumstances, the convicting magistrate was functus officio, and therefore could not issue the warrant in question, which should have been issued by the Sessions; and possibly they could have directed punishment for the unexpired term; but that if no bail had been given, and the prisoner had remained in custody, no further order of commitment would have been necessary, or if no warrant of commitment had been issued prior to appeal, the magistrate could have issued one thereafter:—Held, also, there was power to act under R. S. O. c. 70, and so a Judge in Chambers could deal with the motion: that marking the writ as under the Statute of Charles, did not prevent the learned Judge so acting under c. 70, or at common law; and as no offence was declared the prisoner was directed to be discharged on the habeas corpus:—Held, also, that under a certiorari the conviction might be quashed; and, as the judgment of the Sessions confirmed the conviction, it would probably fall with it. *Regina v. Arscott*, 9 O. R. 541.—Rose.

Semble, that the warrant issued in this case after the dismissal of the appeal by the Sessions, and which followed the original conviction in directing imprisonment for six months, without, making allowance for the two days' imprisonment already suffered, was not open to objection. *Arscott v. Lilley et al.*, 11 O. R. 153.—Q. B. D.

See *Regina v. Ramsay*, 11 O. R. 210, p. 634.

### 2. Appeals from Sessions.

The defendants having been convicted by a police magistrate of an offence against the pro-

visions of C. S. C. c. 95, appealed to the Quarter Sessions, and the convictions were affirmed. Defendants now applied for a certiorari to remove the convictions, notwithstanding that 32 & 33 Vict. c. 31, s. 71, (Dom.) as amended by 33 Vict. c. 27, s. 2, (Dom.) expressly takes away the right to certiorari where there has been an appeal to the sessions:—Held, that where the magistrate has jurisdiction over the offence charged, and the right to certiorari is taken away, the court cannot examine the evidence to see if the magistrate had jurisdiction to convict, and the certiorari was refused. *Regina v. Scott et al.*, 10 P. R. 517.—Rose.

Where a defendant submits to examination before a magistrate it is too late afterwards to object to its propriety. In cases where a magistrate has jurisdiction certiorari is absolutely taken away, but an appeal to the sessions still exists, which however is itself also taken away by sec. 111 of the Canada Temperance Act, 1878, where the conviction is before a stipendiary magistrate. *Regina v. Ramsay*, 11 O. R. 210.—Galt.

## SET-OFF.

### I. SUBJECT MATTER OF SET-OFF, 634.

#### II. OF COSTS—SEE COSTS.

#### III. CROSS JUDGMENTS—SEE JUDGMENT.

#### IV. PLEADING COUNTER CLAIM AND SET-OFF—SEE PLEADING.

### I. SUBJECT MATTER OF SET-OFF.

After plaintiff had commenced an action against the defendant to recover from him in respect of his unpaid stock in a joint stock company the sum of \$442.29, being the amount of an unsatisfied judgment recovered by the plaintiff against the company for \$4,333.08, and assigned it to one G., who assigned part of the money recovered to the extent of \$500, the amount of the defendant's unpaid stock, to the defendant. The object of the assignment to the defendant was to give him priority over the plaintiff's claim:—Held, that the procuring of such assignment by defendant being for such purpose, and being a voluntary act on defendant's part, and with notice of plaintiff's claim, did not constitute a defence to it; but—Semble, if the set-off had accrued to the defendant in his own right, although after action brought, it would have been otherwise. *Fild v. Galloway*, 5 O. R. 502.—C. P. D.

Held on the evidence in this case that the master was right in disallowing a large set off brought in by the defendant over and above the sum of \$1,600 allowed for reconstructing the buildings. *Snarr et al. v. Badenach*, 10 O. R. 131.—Boyd.

In an action of trespass for entering the warehouse of a deceased person (of whom the plaintiff was the administrator) after his death and taking and converting the goods therein, the defendant set off a debt due by deceased to him. An administration order had been made of which the defendant had notice before defence. The set off was—Held bad under 27 Vict. c. 28, s. 28, and also because of the administration order. *Monteith v. Walsh*, 10 P. R. 162.—Dalton, Master.

J. I., the appellant, gave to one Q. his note for \$5,000 which was endorsed to the Bank of P. E. I.; the Union Bank of P. E. I. at the time held a cheque or draft, made by the Bank of P. E. I., for nearly the same amount, and this draft the appellant purchased for something more than \$200 less than its face value; being sued on the note he set off the amount of such cheque or draft, and paid the difference. On the trial he admitted he had purchased it for the purpose of using it as an off set to the claim on his note, which he had made non-negotiable, and he also admitted that if he could succeed in his set off and another party could succeed in a similar transaction, the Union Bank would get their claim against the Bank of P. E. I., which had become insolvent, paid in full. The judge on the trial charged that if the draft was endorsed to the defendant to enable him to use it as a set off he could not do so, because he was a contributory within the meaning of the 76th section of the Canada Winding-up Act, and that the Act which came into force on the 12th May, 1882, was retrospective as regards the endorsements made before it was passed, but within thirty days before the commencement of the proceedings to wind up the affairs of the bank. The jury, under the direction of the judge, found a general verdict for the plaintiff for the amount of the note and interest, which the Supreme Court refused to disturb. On appeal to the Supreme Court of Canada:—Held, reversing the judgment of the court below, that appellant having purchased the draft in question for value and in good faith prior to 26th May, 1882, the Canada Winding-up Act, 45 Vict. c. 23, was not applicable, and therefore the appellant was entitled to the benefit of his set off, and that the Winding-up Act was not retrospective as to this endorsement. *Ings v. Bank of Prince Edward Island*, 11 S. C. R. 265.

It appeared that during S. P.'s ownership, the government constructed a breakwater at the mouth of the river, and that S. P. had been awarded damages "on account of the penning or damming up of the waters by the construction of the breakwater, and forcing them back on S. P.'s property," and on another account not material to this action:—Held, that as the sum awarded was a lump sum for both accounts together, and as the evidence on the arbitration shewed that the breakwater only affected S. P. to the extent of three feet of water, leaving him a fall of five feet, the value of which could only be ascertained by a reference to the subjects of the arbitration and the action on the covenant were not the same, the company were not entitled to set off the money recovered from the government against their liability for damages for their breach of contract. *Platt v. The Grand Trunk R. W. Co.*, 12 O. R. 119.—Proudfoot.

Held, that a married woman, though married before May 4th, 1859, was not bound by a covenant of her husband, entered into by him for himself, his heirs and assigns as a lessor of certain lands, to pay at the expiration of the lease for a certain malthouse which the lessee was to have liberty to erect on the demised premises, though the reversion had been assigned to her husband and another as trustees for her, in such a way that she had the entire beneficial interest, and though the covenant ran with the land:—

Held, also, that a claim on behalf of the said trustees for rent in arrear and for damages for non-repair was not matter of set-off against damages recovered against the husband for breach of his covenant to purchase the malthouse, though he was one of the trustees, they not being matters arising in the same right. *Ambrose v. Fraser et al.*, 12 O. R. 459.—Ferguson.

See *Dawson v. Moffatt*, 10 P. R. 366, p. 652.

## SETTLED ESTATES ACT.

Upon a petition under the Settled Estates Act, Boyd, C., dispensed with the examination required by the Act of a married woman interested who lived out of the jurisdiction, but not of one who lived within the jurisdiction. The Married Woman's Property Act, 1884, (Ont.), does not apply to cases under the Settled Estates Act, where the woman has acquired the property before the passing of the former Act. *Re English*, 11 P. R., 196.

## SETTLEMENTS.

See HUSBAND AND WIFE.

## SETTLING MINUTES.

See JUDGMENT.

## SEWERS.

See MUNICIPAL CORPORATIONS—WATER AND WATERCOURSES.

## SHAREHOLDERS.

See CORPORATIONS.

## SHERIFF.

### I. LIABILITY ON WRITS OF EXECUTION.

1. *To Attachment*, 636.
2. *On Abandoning Seizure*, 637.

### II. INTERPLEADER ON ADVERSE CLAIMS—See INTERPLEADER.

### III. LANDLORD'S CLAIM FOR RENT, 637.

### IV. FEES AND CHARGES.

1. *Poundage*, 637.
2. *Other Charges*, 638.

### I. LIABILITY ON WRITS OF EXECUTION.

#### 1. *To Attachment*.

Under an execution in *McLean v. Anthony* the sheriff, on the 19th April, 1883, having seized the defendant's goods, sold them to one Ferguson, there being at the time rent overdue to the landlord. Ferguson did not remove the goods upon a



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*Ambrose v. Fraser*  
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P. R. 366, p. 652.

## TES ACT.

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## ENTS.

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636.

Seizure, 637.

ADVERSE CLAIMS—See

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638.

ITS OF EXECUTION.

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from the premises. By agreement between the landlord, the sheriff, and Ferguson, the latter retained sufficient of the purchase money to pay the claim for rent. Subsequently Ferguson sold the goods to one English, when it was arranged that English should pay the old claim for rent, and a further instalment which had meanwhile fallen due. The defendant then surrendered his term, and English became tenant. On the 23rd of April, an execution in Slater v. Anthony was placed in the sheriff's hands, and he seized the same goods some time between 21st May and 23rd June. English having claimed the goods, the sheriff interpleaded, and an issue was directed which resulted in favour of Slater. Pending the interpleader issue the sheriff allowed the landlord's bailiff, who also claimed the goods for arrears of taxes, to sell them and pay the rent and taxes in arrear. At the conclusion of the interpleader issue it appeared that the sheriff had taken no security for the goods, and that English, the claimant, was worthless:—Held, that there being no claim either for rent or taxes which the sheriff was justified in acknowledging, he was liable to an attachment, on motion of the execution creditor, for disobedience of the interpleader order. *Maclean v. Anthony*.—*Slater v. Anthony*, 6 O. R. 330.—Rose.

### 2. On Abandoning Seizure.

Where a sheriff, having seized goods of sufficient value to satisfy the plaintiff's execution, abandons them on being indemnified he should not get the benefit of any doubt which may be raised as to their realizing enough if sold. *Donnelly v. Hall*, 7 O. R. 581.—Q. B. D.

### III. LANDLORD'S CLAIM FOR RENT.

Writs of execution had been placed in the hands of the sheriff of Hastings, under which he made a levy on goods in Belleville and Madoc, leaving them on the premises in which he found them. After the service, which was on the 12th of February, and while the goods were in the debtor's premises, two instalments of rent fell due, on the 1st of March and June, which were paid by the sheriff:—Held, that this payment should not be allowed, because the goods might have been removed by him before the rent fell due, and being under seizure, they were not liable to distress, and there was nothing in the debtor's lease to accelerate payment of rent on seizure of his goods. *Grant v. Grant*, 10 P. R. 40.—Wilson.

See *Baker et al. v. Atkinson et al.*, 11 O. R. 735, p. 195; *Trust and Loan Co. of Canada v. Lawson*, 10 S. C. R. 679, p. 196; *Adams v. Blackwell*, 10 P. R. 168, p. 353.

### IV. FEES AND CHARGES.

#### 1. Poundage.

Held, that the sheriff was entitled to charge poundage upon each of several writs though all were issued by the same solicitor and were placed in his hands at the same time. *Grant v. Grant*, (and five other cases), 10 P. R. 40.—Wilson.

A sheriff upon arresting a judgment debtor upon a ca. sa. thereby becomes at once entitled

as against the execution creditor to full poundage on the amount of the execution. *McNab v. Oppenheimer*, 11 P. R. 348.—Galt.

#### 2. Other Charges.

The sheriff paid persons at Belleville and at Madoc for "taking stock" after the levy:—Held, that these payments should be disallowed, as they do not appear in the tariff, and the local master was precluded by R. S. O. c. 66, s. 51 from allowing anything to the sheriff which was not correct and legal. *Grant v. Grant*, (and five other cases), 10 P. R. 40.—Wilson.

It appeared that the deputy-sheriff kept the keys of the store in Belleville, and went himself twice a day to see that the goods were safe:—Held, that the payment to him of \$2 per day as possession money should have been allowed only if the master were satisfied that it was necessarily and actually paid, and the item was referred back for reconsideration, it being alleged that the only possession was locking up the store and keeping the key. *Id.*

Held, also, that the plaintiff properly applied to a Judge in Chambers to review the taxation pursuant to R. S. O. c. 66, s. 52, as Rule 447 applied only to the Toronto taxing officers appointed under Rule 475, O. J. Act. *Id.*

## SHIP.

### I. APPLICATION OF IMPERIAL STATUTES, 638.

#### II. LIABILITY OF OWNERS.

1. *For Goods Supplied to Vessel*, 638.
2. *For Fire from Steamboats*, 639.
3. *For Salvage*—See p. 642.

#### III. CONTRACTS TO CARRY, 639.

#### IV. MASTER, 641.

#### V. TOWAGE, 641.

#### VI. SALVAGE, 642.

#### VII. FERRY—See FERRY.

#### VIII. MARINE INSURANCE—See INSURANCE.

### I. APPLICATION OF IMPERIAL STATUTES.

Held, in this case that the provisions of the Imperial "Merchants' Shipping Act" did not prevent the property in the ship passing to the assignee under the "Insolvent Act, 1876." *Jones et al. v. Kinney et al.*, 11 S. C. R. 708.

See *Sewell v. British Columbia Towing and Transportation Co.*, 9 S. C. R. 527, p. 642.

#### II. LIABILITY OF OWNERS.

##### 1. *For Goods Supplied to Vessel.*

Where one brought action against the registered owners of a certain vessel for the value of goods supplied before they became such owners, not on the order of the defendants but on the order of one G. C., between whom and the defendants no relation of agency was proved:—

Held, that the plaintiff could not recover:—Held, also, that it was open to the defendants to shew that their real interest was that of mortgagees, though ostensibly registered owners. *Nelson v. Wight et al.*, 8 O. R. 82.—Boyd.

The fact that the vessel got the benefit of the supplies and necessities did not make the registered owner liable. *Ib.*

## 2. For Fire from Steamboats.

Held, (affirming the judgment of Proudfoot, J.) that the evidence which appears in the report of this case, was sufficient to go to a jury to establish negligence in the management of the defendant's steamboat. *Hilliard v. Thurston*, 9 A. R. 514.

Per Burton and Patterson, J.J. A., the owner of a steamboat navigating the inland waters of Ontario without legislative authority, is liable for loss occasioned to property by fire communicated thereto by the steamer without any proof of actual negligence. *Ib.*

Per Burton, J. A., the fact that a steamboat has been granted a licence by the Inspector under the authority of the Act for the Inspection of Steamboats, 31 Vict., c. 65 (Dom.), does not remove, neither was it intended to remove, the common law liability of the owner of such steamboat to a person whose property is injured. *Ib.*

## III. CONTRACTS TO CARRY.

By a charter party of 11th December, 1878, it was agreed that plaintiff's vessel then on her way to Shelburne N. S., should proceed with all possible despatch, after her arrival at Shelburne, to St. John, and there load from the charterers a cargo of deals for Liverpool; and if the vessel did not arrive at Shelburne on or before 1st of January, 1879, the charterers were to be at liberty to cancel the charter party. The vessel arrived at Shelburne in December, and sailed at once for St. John. At the entrance of the harbour of St. John she got upon the rocks and was so badly damaged that it became necessary to put her on the blocks for repairs. Although she was repaired with all possible despatch, she was not ready to receive her cargo until 21st of April following, prior to which time—on 26th March—the charterers gave the owners notice that they would not furnish a cargo for her. The owners sued for breach of the charter party, and on the trial defendants gave evidence, subject to objection, that freights between St. John and Liverpool were usually much higher in winter than in summer; that lumber would depreciate in value by being wintered over at St. John, and also as to the relative value of lumber during the winter and in the spring in the Liverpool market; and it was contended that the time occupied in repairing the damage was unreasonable and had entirely frustrated the objects of the voyage. The judge directed the jury that if the time occupied in getting the vessel off the rocks and repairing her was so long as to put an end, in a commercial sense, to the commercial speculation entered into by the shipowners and charterers, they should find for the defendants. The ver-

dict being for the defendants, the court below made absolute a rule for a new trial. On appeal to the Supreme Court of Canada, it was:—Held affirming the judgment of the court below, that as there was no condition precedent in the charter that the ship should be at St. John at any fixed date, and as the time taken in repairing the damage was not unreasonable, and the delay did not entirely frustrate the object of the voyage, the charterers were not justified in refusing to carry out the contract. *Carrill v. Schofield*, 9 S. C. R. 370.

On the 3rd October the plaintiff chartered "The Erie Belle," a vessel owned by the defendants, to carry salt from Goderich to Milwaukee at 75 cents a ton. On the 11th October the defendants telegraphed informing the plaintiff that this vessel could not go, and requesting him to accept the services of another. Thereupon some correspondence ensued between the parties, the plaintiff insisting upon the defendants performing their contract, and they finally agreeing to do so. During all this time the plaintiff could have had the salt conveyed by other vessels at \$1.00 per ton, but did not, preferring to wait for the defendant's vessel which was loaded on the 25th November. Owing however to the apprehensions of the captain as to the weather, which deterred him from going out, the vessel was frozen up in Goderich harbour, and it was then impossible to forward the salt otherwise than by rail; and for the purpose of endeavouring to carry out a sale which the plaintiff had made, he did send several tons by rail, and paid his consignee the difference in price for salt which he had to buy in Milwaukee and that agreed to be paid to the plaintiff. The difference in expense in sending by rail and that agreed to be paid to the defendants, amounted to \$3.25 per ton:—Held, affirming the judgment of the court below, 46 Q. B. 235, that the plaintiff was not bound at the peril of losing all claim against the defendants for any additional loss, to have chartered another vessel at \$1.00 per ton, on receipt of the telegram of the 11th October; and that, under the circumstances, the plaintiff was entitled to recover the difference paid to his consignee as also the excess of freight. Cameron, J., dissenting, who thought that the sum of 25 cents per bushel, allowed by the arbitrator, the advance in freight for which the salt could have been carried, was all that the plaintiff was entitled to recover. *McEwan v. McLeod*, 9 A. R. 239.

The plaintiffs alleged and proved an agreement with the defendants that the defendants' vessel should proceed to B. and carry thence to C., a cargo of lumber; that the vessel did not go to B. as agreed; and that in consequence the plaintiffs had to procure another vessel and pay a larger price than that agreed upon with the defendants. The defendants alleged that the reason they did not go for the lumber was, because the plaintiffs did not give them or send to the master of the vessel the necessary orders. The judge who tried the action in the County Court of Lambton, found this allegation untrue, and gave judgment for the plaintiffs:—Held, that this court could not reverse the finding in the court below upon this question, as the view of the facts presented by the appellants, derived in support from the documents in evidence, and the court did not see its way to taking a differ-

the court below trial. On appeal it was:—Held, court below, that precedent in the charter of St. John at any time in repairing the vessel and the delay did not affect the voyage. Affirmed, refusing to grant *Will v. Schofield*, 9

tiff chartered "The" by the defendants, to Milwaukee at 75 cents per ton. Over the defendants' plaintiff that this vesseling him to accept thereupon some compensation the parties, the defendants performed finally agreeing to the plaintiff could

by other vessels at referring to wait for the vessel was loaded on the weather, which the vessel was frozen and it was then impossible otherwise than by rail: favouring to carry out and made, he did send his consignee the which he had to buy to be paid to the expense in sending to be paid to the defendants:—Held, of the court below, plaintiff was not bound against the defendant, to have chartered ton, on receipt of the vessel; and that, under plaintiff was entitled to his consignee as

Cameron, J., dissented the sum of 25 cents per ton, the advance could have been carried plaintiff was entitled to *Lead*, 9 A. R. 239.

proved an agreement the defendants' vessel carry thence to C. Co. vessel did not go to consequence the plaintiff vessel and pay a sum upon with the defendants alleged that the reason the lumber was, because they sent to the necessary orders. The court in the County Court, illegation untrue, and plaintiffs:—Held, that the finding in the action, as the view of the appellants, derived from the evidence, and the to taking a different

view of the evidence from that taken by the judge at the trial:—Held, also, that it was sufficiently proved that the plaintiffs were ready and willing to ship the lumber: but, per Burton, J. A., (dissenting). The plaintiffs should have averred, and the onus was upon them to shew, and they did not shew their readiness and willingness to ship the lumber on the defendants' vessel. The case, however, was disposed of in the court below on an immaterial issue; and as the appellants chose to rest their case upon a point which the judge found against them, the appeal should be dismissed. *McKenzie et al. v. Dancy et al.*, 12 A. R. 317.

See *Perkins v. Mississippi and Dominion Steamship Co. (Limited)*, 10 P. R. 198, p. 547.

#### IV. MASTER.

Dismissal of master for disobedience, &c., he being a large shareholder in the company. See *Guldford v. The Anglo-French Steamship Co.*, 9 S. C. R. 303.

See *International Wrecking and Transportation Co. v. Lobb et al.*, 11 O. R. 408, p. 642.

#### V. TOWAGE.

The B. C. T. Co. entered into a contract of towage with S. to tow the ship Thrasher from Royal Roads to Nanaimo, there to load with coal, and when loaded to tow her back to sea. After the ship was towed to Nanaimo, under arrangement between the B. T. C. Co. and the M. S. Co., the remainder of the engagement was undertaken between the two companies, and the M. S. Co.'s tug boat, Etta White, and the B. C. T. Co.'s tug, Beaver, proceeded to tow the Thrasher out of Nanaimo on her way to sea, the Etta White being the foremost tug. Whilst thus in tow the ship was dragged on a reef, and became a complete wreck. The night of the accident was light and clear, the tugs did not steer according to the course prescribed by the charts and sailing directions; and there was on the other side of the course they were steering, upwards of ten miles open sea free from all dangers of navigation, and the ship was lost at a spot which was plainly indicated by the sailing directions, although there was evidence that the reef was unknown. The ship had no pilot, and those aboard were strangers to the coast. In an action for damages for negligently towing the ship, and so causing her destruction:—Held, 1. That as the tugs had not observed those proper and reasonable precautions in adopting and keeping the courses to be steered, which a prudent navigator would have observed, and the accident was the result of their omission to do so, the owners of the tugs were jointly and severally liable (*Taschereau, J.*, dissenting as to the liability of the M. S. Co., and holding that the B. C. T. Co. were alone liable). 2. That under the British Columbia Judicature Act the action was maintainable in its present form by joining both companies as defendants. 3. That as there was nothing in the M. S. Co.'s charter or Act of incorporation to prevent their purchasing and owning a steam tug, and as the use of such a vessel was incidental to their business, they had a perfect right to let the tug to hire for such purposes as it was used for in the present case. 4. That as the

tugs in question were not registered as British ships at the time of the accident their owners were not entitled to have their liability limited under 20 and 26 Vict. (Imp.) ch. 63. 5. That the limited liability under sections 12 of 31 Vict. ch. 58 (Dom.) does not apply to cases other than those of collision. *Swell v. British Columbia Towing and Transportation Co.*, 9 S. C. R. 527.

#### VI. SALVAGE.

A vessel being stranded on the northern shore of Lake Erie, the master telegraphed to the manager of a wrecking company at Detroit, for tugs and wrecking apparatus, to which the manager answered agreeing to furnish same. They were accordingly sent and the vessel rescued and saved. The plaintiffs claimed to recover an amount exceeding the value of the vessel, made up of per diem charges for the tugs and apparatus:—Held, that in actions in the High Court, salvors, in the absence of a specific or express agreement to the contrary, must be taken to render their services under and subject to the rule of the Admiralty Court, limiting the maximum amount of salvage to a moiety of the value of the saved vessel, and cargo, if any, which rule is equally applicable to wrecking companies as to ordinary vessel owners: that the agreement must define a specific amount as to the salvage to be paid or a rule whereby it may be determined; and that there was no agreement here, but merely a request to perform the services:—Sembles, that the master of a vessel cannot by express agreement bind the owners to pay salvage beyond the value of the vessel. *The International Wrecking and Transportation Company v. Lobb et al.*, 11 O. R. 408—C. P. D.

#### SHOPS.

See INTOXICATING LIQUORS.

#### SHORT FORMS.

See DEED.

#### SIDEWALKS.

See WAY.

#### SLANDER.

See DEFAMATION.

#### SNOW.

Action for damages sustained by plaintiff by reason of ice and snow falling from roof of defendant's house. See *Landreville v. Gouin*, 6 O. R. 455, p. 469.

Liability of Municipal Corporation for negligence in allowing accumulation of snow on the sidewalk. See *Bleakley v. The Corporation of Prescott*, 12 A. R. 637, p. 720.

## SOCIETY.

See CORPORATIONS.

## SOCIETY OF FRIENDS.

See *Dortland v. Jones*, 12 A. R. 543, p. 80.

## SOLICITOR.

## I. AGENT OF SOLICITOR, 643.

## II. PROCEEDINGS AGAINST AND LIABILITY OF.

## 1. For Negligence, 644.

## 2. To Summary Jurisdiction.

(a) To Enforce Undertaking, 644.

(b) Contempt of Court, 644.

(c) Striking off the Rolls, 644.

## III. AUTHORITY.

1. In reference to Actions, 645.

2. To Receive Money, 646.

## IV. DEALINGS WITH CLIENT, 646.

## V. RETAINER, 647.

## VI. TAKING SECURITY FOR COSTS, 647.

## VII. COSTS.

1. Moderation of Costs, 647.

2. Reference to Taxation or Revision.

(a) Delivery and Order for Taxation, 648.

(b) What may be Referred, 648.

(c) Special Circumstances, 649.

3. Liability to Refund, 650.

4. Other Cases, 650.

## VIII. LIEN FOR COSTS, 651.

## IX. MISCELLANEOUS CASES, 652.

## I. AGENT OF SOLICITOR.

In a certain suit D. acted generally as solicitor for H. who had been appointed administrator pendente lite. In certain matters, however, in connection with the proceedings, D. advised H. to retain another solicitor, deeming it improper to act himself for H. in respect to these matters, as he was also acting for another party. The solicitor thus retained by H. agreed with D. to do the work which he was retained to do for agency charges of which he rendered D. an account. D. made up one bill of costs and rendered it to H. which included at full rates the services which the other solicitor had performed at agency rates. H. paid the bill with these charges to D.:—Held, that the master on taking H.'s accounts with respect to the estate of which he had been appointed administrator, should have allowed the bill as properly paid so far as concerned the said charges, for there was nothing improper in the transaction. *Beatty v. Hal- dan*, 10 O. R. 278.—Ferguson.

Service of papers on Toronto Agent. See *Prittie v. Snider*, 11 P. R. 313.

See *Re Ryan*, 11 P. R. 127, p. 652.

## II. PROCEEDINGS AGAINST AND LIABILITY OF.

## 1. For Negligence.

A solicitor entrusted with moneys to invest, did so on property of insufficient value, and his client, shortly after the loan, desired him to realize the amount advanced, which the solicitor endeavoured to do by getting the owner to effect another loan from a Building Society. He desired his client to release his mortgage for that purpose, undertaking to obtain security on chattel property for any deficiency before acting on the release. The society refused to advance more than \$800, which it was stipulated should be paid to the client, thus leaving a balance due him of about \$150. The solicitor procured from the mortgagor a chattel mortgage on cattle, &c., variously valued at from \$100 to \$130: such security being made out in the name of the client, and only requiring his affidavit of bona fides to have it registered. This the client refused to accept, and instituted proceedings against his solicitor for the surplus of his claim; and the Judge of the County Court gave a verdict and judgment for \$177 against the latter. On appeal, this Court, (Burton, J.A., dissenting) being of opinion that the plaintiff had of his own wrong lost the benefit of the chattel mortgage, reduced the judgment by \$117, thus limiting the verdict to \$60, with Division Court costs, but refused to either party costs of the appeal. *O'Callaghan v. Bergin*, 11 A. R. 594.

See *Taylor v. Magrath*, 10 O. R. 669, p. 690.

## 2. To Summary Jurisdiction.

## (a) To Enforce Undertaking.

The Court will not summarily compel a solicitor to perform an agreement or undertaking, merely because he is a solicitor; if it was not given by him in his professional connection with the suit or matter, the party to whom it is given will be left to his action. *Wilson v. Beatty—Re Donovan and Morphy*, 12 A. R. 252.

Where M., a solicitor, unsuccessfully prosecuted a petition against the applicant at his own expense, in the name of one H., agreeing to indemnify H. against costs, M.'s interest being merely as surety on a bond for H., a summary application to make M. pay the costs of the petition was refused. *Id.*

## (b) Contempt of Court.

Contempt of Court by publication of letter in the public newspapers commenting on a case pending appeal from the Master. See *Regina ex rel. Felitz v. Howland—Re O'Brien*, 11 O. R. 633, p. 88. Affirmed 14 A. R. 184.

## (c) Striking off the Rolls.

It was charged against T., a solicitor, that on W. being about to be tried for a criminal offence, was induced by T., as her solicitor, to pay him \$200 for the purpose of influencing the jury. The court, upon the facts stated in the report being satisfied that the charge was proved, an order was made striking him off the rolls. The petitioner having made a prima facie case, and

## D LIABILITY OF.

ce.

moneys to invest, value, and his desired him to which the solicitor the owner to effect Society. He de mortgage for that tain security on ency before acting refused to advance stipulated should a balance due ror procured from age on cattle, &c., 100 to \$130: such the name of the is affidavit of bona his the client re- tuted proceedings surplus of his claim; Court gave a ver- against the latter. n, J.A., dissenting) ntiff had of his own chattel mortgage, 7, thus limiting the on Court costs, but sts of the appeal. R. 594.

O. R. 669, p. 690.

## Jurisdiction.

## undertaking.

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## he Rolls.

, a solicitor, that on- or a criminal offence, solicitor, to pay him nfluencing the jury. stated in the report urge was proved, an off the rolls. The prima facie case, and

being unable from want of means to proceed with the application, a solicitor was appointed by the court to take the matter up. *Re Titus, a Solicitor*, 5 O. R. 87.—Boyd.

See *Wilson v. Beatty—In re Donovan*, 9 A. R. 149, p. 650.

## III. AUTHORITY.

## 1. In Reference to Actions.

Per *Wilson, C. J. C. P.*—If parties to an action authorize their solicitors to enter into negotiations for a settlement, and while the negotiations are proceeding, one party unknown to his own or to the opposite solicitors, writes to the other party personally withdrawing from the negotiations, and the respective solicitors, not knowing what has taken place between their clients meanwhile, conclude the terms of a settlement, such settlement will not be binding on the party who had thus withdrawn from the negotiations, because the other party had direct notice of his withdrawal. *Vardon v. Vardon*, 6 O. R. 719.—Chy. D.

Semble, that if the principals had, between themselves, entered into an agreement, and the solicitors in ignorance of what the clients were doing, had previously concluded a different agreement, the agreement made by the solicitors would bind because prior in time. *Ib.*

On the same reasoning where the two principals negotiate, and either perfect a contract or put an end to proposals for one before the delegated power to their agents has been fully exercised, the acts of the principals are the binding acts, and the subsequent acts of the agents are of no avail as against their principals. In this case, upon the letters and evidence set out in the report, it was—Held, that the defendant had not withdrawn his prior proposals and abandoned the negotiations before a final arrangement had been come to by the respective solicitors. *Ib.*

A settlement of an alimony action after judgment for permanent alimony, upon which writs of execution were in the sheriff's hands, was effected between the parties without the intervention of the solicitors on the record. To carry out the settlement a third solicitor was instructed to withdraw the writs from the sheriff's hands, which he did without paying the costs of the plaintiff's solicitor, which he knew were unpaid. There was no collusion or actual fraud against the plaintiff's solicitor proved:—Held, that the plaintiff's solicitor had control of the writs in the sheriff's hands to the extent of his unpaid taxable costs, and that he was entitled to have the writs replaced, or new writs placed in the sheriff's hands at the expense of the solicitor who withdrew them and the plaintiff, or to an order directly against the defendant for payment of his unpaid taxable costs, and for the costs of the motion against the plaintiff and the solicitor who withdrew the writs; but that he was not entitled to an order for payment of his unpaid costs by the solicitor or the sheriff. *Friedrich v. Friedrich*, 10 P. R. 308.—Ferguson.

Affirmed in Chy. D. with this variation, that the solicitor who withdrew the writs was relieved from the payment of costs. *Ib.* 546.

A Montreal firm of solicitors brought an action for one C. against H., the now plaintiff, which was settled for \$3,700, of which H. paid \$3,000, and gave the solicitors a note for \$5,500 made and endorsed respectively by the defendants Griffith and Gimson, and held by H. as endorsee, out of which they were to take the \$700 and their costs. They sent a clerk to Toronto, where defendants lived, to effect a settlement, but being unable to do so, he left the note for collection with M. & Co., a Toronto firm of solicitors. After legal proceedings had been instituted, plaintiff paid C. the \$700. A settlement was discussed between the solicitors, which M. & Co. agreed to, provided their costs and the charges for the clerk's expenses to Toronto were paid. Negotiation for a settlement had been going on between the parties themselves, and on the 2nd December an agreement was entered into, that defendants should pay \$5,000 clear of everything, to the plaintiff. On the 4th December defendants' solicitors were informed by M. & Co. of other parties, besides the plaintiff, being interested in the note. On 6th December the parties met and effected a settlement, by plaintiff accepting \$5,000 in full of all claims under the action. The note which was held by M. & Co. was never delivered up to the defendants:—Held, that the action was not the plaintiff's, but that of C., or for his benefit, and that M. & Co. could proceed therewith, as C.'s solicitors, to enforce payment of their costs, and the Montreal solicitors charges: that the settlement of a claim under a negotiable security without the security being delivered up, subjected the defendants to such charges as were a specific lien thereon, of which they had notice; or;—Semble, even without notice: that the effect of the agreement of the 2nd December was that the defendants should pay M. & Co.'s costs, and defendants afterwards on the settlement made not providing then for, and leaving the note outstanding, was some evidence of collusion to deprive M. & Co. of their costs, and that the notice given not to settle without providing for M. & Co.'s costs, etc., gave M. & Co. an equitable claim to the interposition of the court. *Hall v. Griffith et al.*, 5 O. R. 478.—C. P. D.

## 2. To Receive Money.

Authority to receive mortgage money. See *Gillen v. The Roman Catholic Episcopal Corporation of the Diocese of Kingston in Canada et al.*, 7 O. R. 146, p. 433; *McMullen v. Polley*, 12 O. R. 702, p. 433.

## IV. DEALINGS WITH CLIENT.

In this action the plaintiff, in her statement of claim, charged her brother the defendant D. M. McD., with inducing her father to make a will in her mother's favour, with the fraudulent design on the part of D. M. McD. of obtaining the whole estate for himself, and charged that her father was induced to make the will by fraudulent misrepresentations, and that after her father's death, D. M. McD. obtained from her mother a power of attorney to manage the estate, and invested large sums in the purchase of property in his own name and that of his wife, and prayed to have the will set aside. D. M. McD., in the examination for discovery before

the trial, admitted receiving the power of attorney from his mother after his father's death, and dealing with the estate under it, but denied having used any portion of the estate for his own purposes:—Held, that although what took place after the father's death was no proof of the fraudulent design, it might throw light upon it; and although the plaintiff was entitled to know generally what dealings the defendant D. M. McD. had with the estate, and to interrogate D. M. McD. upon his examination before the trial, as to whether he had invested all the moneys of the estate in his own or his wife's name, yet a general inquiry as to his dealings with each part and parcel of the estate, or as to what property came into his hands under the power of attorney, should not be permitted. *MacGregor v. MacDonald*, 11 P. R. 386—C. P. D.

Action for breach of duty as trustees in management of estate. See *Taylor v. Magrath*, 10 O. R. 669, pp. 690, 691.

#### V. RETAINER.

Where a solicitor had instructions to defend a suit, which was discontinued and a new one for the same cause of action was commenced:—Held that the original retainer to defend continued in the new suit. *Clarke v. The Union Fire Ins. Co.*—*Caston's Case*, 10 P. R. 339.—Hodgins, *Master in Ordinary*.

#### VI. TAKING SECURITY FOR COSTS.

D. being indebted to the plaintiff for costs in some suits and other matters, by an instrument not under seal assigned to him a lease of certain premises made by D. to the defendant, together with all rent in respect of said lease and the term thereby created. In an action to recover from the defendant the rent due which accrued due after the making of the assignment, the judge charged the jury that while plaintiff remained D.'s solicitor he could not take any security for his benefit, and that he should have discovered the connection between them, and let D. have independent legal advice:—Held, misdirection, for that the assignment, if not invalid in other respects, was valid so far as it was a security for costs already incurred:—Held, also that D. was not a necessary party. *Galbraith v. Irving*, 8 O. R. 751—C. P. D.

#### VII. COSTS.

##### 1. Moderation of Costs.

On an appeal from a certificate of the master in which he held that under an order which directed him to "ascertain and state what amount, (if any,) is properly chargeable by J. H. against the estate of T. W. deceased in respect of legal proceedings taken by the said J. H. as administrator pendente lite of the said estate in the courts or otherwise," the bills of costs of the solicitor of the administrator should be taxed in order to ascertain the amount due. It was:—Held, that the master was wrong; that the bills should, if necessary, be subjected to moderation, and not taxation; that moderation is a well understood term, and is more liberal than taxation even as between solicitor and client. *Beatty v. Haldan*, 6 O. R. 715.—Proudfoot.

##### 2. Reference to Taxation or Revision.

##### (a) Delivery and Order for Taxation.

Upon a motion in Chambers for an order for the delivery and taxation of a solicitor's bill of costs relating to certain proceedings under mortgage:—Held, that the Chancery practice of obtaining such orders on præcipe is the more convenient one, and should prevail in all divisions of the High Court of Justice. Order made with costs as of a præcipe order. *Re Fitzgerald*, a *Solicitor*, 10 P. R. 279.—Dalton, *Master*.

Held, that by the O. J. Act, the former practice has been changed, and an order referring a bill of costs to a taxing officer, should not direct the officer to do more than ascertain the proper amount of it. *Macdonald v. Piper*, 10 P. R. 586.—Dalton, *Master*.

##### (b) What may be Referred.

In an administration suit in which the estate was insolvent, the total assets being \$72,000, the liabilities \$138,475, and the creditors 180 in number, and in which the commission of the solicitor, who acted for all parties, was allowed by the master, under G. O. Chy. 643, at \$995, eight creditors, at the close of the suit, and without notice to the solicitor until fourteen days before moving, applied for an order for the delivery and taxation of the solicitor's bill instead of the allowance of the commission, on the ground that the commission was excessive:—Held, that the commission was not so exorbitant as to warrant the substitution of a taxed bill, and a probable reduction by that mode of payment, especially as the benefit to the creditors would be trifling. *In re Stuebing, Anthes v. Dewar*, 10 P. R. 236.—Boyd.

The scope of the G. O. Chy. 643, is merely to aid in fixing a solicitor's remuneration. It is not intended to do strict justice, but is only a sort of convenient expedient for fixing costs without taxation. *Id.*

A very liberal compensation in such cases is not per se a reason for reducing the commission, or directing the taxation of a bill in its stead, nor per contra is a low or inadequate compensation a reason for increasing the commission, or directing payment by a taxed bill. *Id.*

Semble, that in cases affected by this order, any party interested in the estate, who may desire that a solicitor should be paid in the particular matter or suit on the scale of a taxed bill instead of by commission, should give notice to the solicitor to that effect, and have the master note it in his book, at the earliest stage possible in the proceedings, but there is no practice authorizing the substitution of a bill of costs for commission at the option of any party. *Id.*

In proceeding on a judgment for winding up a company, the former solicitor of the company brought in a claim for bills of costs alleged to be due him, which the former Master referred to one of the Taxing Officers to tax:—Held, that the Master had authority to direct such reference. *Clarke v. Union Fire Insurance Co.*—*Caston's Case*, 10 P. R. 339.—Hodgins, *Master in Ordinary*.



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ent for winding up a tor of the company of costs alleged to be Master referred to o tax;—Held, that o direct such refer- *Re Insurance Co.— Hodgins, Master*

On such a reference the Taxing Officer gives his opinion as to whether the fees and charges claimed should be allowed or disallowed, and on that opinion the Master makes his adjudication. *Ib*.

### (c) Special Circumstances.

The rule requiring special circumstances to warrant the reopening or taxation of a bill of costs after twelve months, does not apply where the bill has been delivered after a company has been ordered to be wound up. *Clarke v. The Union Fire Ins. Co.—Custon's Case*, 10 P. R. 339.—Hodgins, *Master in Ordinary*.

After payment of a bill of costs, the court will not disturb it on the ground of overcharge unless it appears to be a case of gross and exorbitant overcharge amounting to fraud. But before payment it is enough if the items are unusual or more than ordinarily large so as to require justification, and if no explanation is furnished by the solicitor, upon whom the onus to do so rests, then taxation will be ordered. *Re Walker—Walker v. Rochester*, 10 P. R. 400.—Boyd.

The following circumstances were held not to be special circumstances which would entitle the client to tax his solicitor's bills after a year from their delivery, because these circumstances could be as well considered at the trial of the action as on a reference to a taxing officer. (1) That the bills sued on contained certain items included in other bills paid by the client; (2) That some work was charged for which never was done; (3) That a payment of \$200 on account by the client was disputed. *Ib*.

Held, that the conjunction of the following circumstances, viz., (1) That the relationship of solicitor and client was continued after delivery of the bills; (2) That there was an offer by the solicitor to make a substantial deduction from the bills sued on, and (3) That there were items of apparent overcharge as to which no explanation was offered by the solicitor, would justify an order for taxation. *Ib*.

The bill of costs in question was for professional services rendered the defendant in an investigation of his conduct as a public official before a commissioner appointed by the Ontario Government. The special circumstance relied upon to enable the defendant to obtain the order for taxation after the lapse of more than a year from the delivery of the bill was, in the words of the defendant, that "there was a distinct understanding between me and the above named plaintiffs that the payment of the said bill of costs was to lie over to await the decision of the Ontario Government, who were by both me and the said plaintiffs, as they stated, expected to pay the said bill of costs, I being one of their officers, and the charges against me having fallen through"—Held, that the existence of the above understanding, if proved, was not a special circumstance within R. S. O. c. 140, s. 35, to justify an order for the taxation of the bill after the lapse of a year, from its delivery; but that the bill should have been taxed subject to such understanding. *Fletcher et al. v. Field*, 10 P. R. 608.—Rose.

Rules 447-449 are not necessarily applicable to a taxation had under 48 Vict. c. 13, s. 22, (Ont.), and where upon a taxation by a local officer,

these rules had not been complied with by the party objecting to the taxation, a revision was nevertheless ordered, the court thinking the bill so exorbitant as to show special circumstances. *Suider v. Suider—Suider v. Orr*, 11 P. R. 140.—Boyd.

Solicitors retained out of moneys in their hands belonging to their client, sufficient to pay their costs, and handed the client a cheque for the balance. The client took the cheque but did not cash it until she had written to the solicitors stipulating that the cashing should be without prejudice to her right to recover a larger sum, if such was due her. After the lapse of a year from the receipt of the cheque, the client applied for an order for the delivery of a bill of costs:—Held, that the circumstances did not amount to payment of the costs, and the order for delivery was made. *Re Sutton*, 11 Q. B. D. 377, distinguished. *Schragg v. Schragg*, 11 P. R. 218.—Boyd.

### 3. Liability to Refund.

In an action instituted by the widow of T. W. to set aside a will alleged to have been executed by him under undue influence, D. acted as her solicitor and obtained a decree as prayed. During the pendency of such action one H. was appointed by the court administrator with the view of getting in certain debts due the estate before being barred by lapse of time. Numerous actions were brought by D. in the name of H., in some of which moneys aggregating a large sum were recovered, whilst in many no benefit whatever resulted to the estate, and costs amounting in the whole to \$2,738.37 were incurred, which had been taxed as between solicitor and client, on H. passing his accounts before the master, and were paid to D. partly by H. out of moneys of the estate, and partly by funds coming into D.'s hands as such solicitor and retained by him. Subsequently a prior will of T. W. was duly proved by the executors named therein, who took proceedings to obtain an account of H.'s administration and a taxation of D.'s costs. These proceedings finally resulted in a dismissal thereof as against D., and an order on H. to pass his accounts, which he did, charging the estate with the amount of costs so paid to D., but on a retaxation of D.'s bills the aggregate amount was reduced to \$725.56, several of the bills having been disallowed in toto, on the alleged ground that the actions had been brought without the leave of the court, and H. was ordered to pay in the difference. H. was unable to do so, and thereupon he, as also the executors, by their several petitions applied for and obtained an order upon D. to repay the amount with costs, or in default be struck off the roll of solicitors. (29 Chy. 250.) On appeal the order was reversed (*Spragge, C. J. O.*, dissenting), the court being of opinion that the taxation and all the other proceedings in reference thereto having been had in a proceeding to which D. was not a party, he could not be bound thereby. Per *Spragge, C. J. O.* Under the circumstances appearing in the matter an order to strike D. off the rolls in case of non-payment was not called for. *Wilson v. Beatty—In re Donovan*, 9 A. R. 149.

### 4. Other Cases.

On the reference in this case H. sought to use a certain bill of costs as a voucher of moneys

properly expended by him in legal proceedings, and it was shewn that the said bill had been properly brought into the master's office on a former reference and properly left there, and that search had been made for it, but without success, although there was no evidence that it had been removed, or that it had been noticed or seen elsewhere afterwards, nor of any occasion when it would probably have been removed from the office:—Held, that the master should have admitted secondary evidence of its contents, and proceedings should have been taken in respect to it as nearly as might be the same as if H. had been able to produce it. *Beatty v. Haldan*, 10 O. R. 278.—Ferguson.

The taxing officer's allocatur is sufficient proof that the business charged for was done by the solicitor. *Clarke v. The Union Fire Ins. Co.*—*Caston's Case*, 10 P. R. 339.—Hodgins, *Master in Ordinary*.

A solicitor for a company is entitled to charge such company for special work and journeys undertaken at the request of individual directors and the general manager. *Ib.*

An order was made in an alimony suit directing the defendant to pay the plaintiff, before hearing of an appeal, a sum of \$40 for the purpose of paying the wife's counsel fee, notwithstanding that the solicitor for the plaintiff would be her counsel on the appeal:—*Quære*, whether owing to the altered status of married women, the reasons for such payment has not ceased. *Magurn v. Magurn*, 10 P. R. 570.—Osler. See also *Ingram v. Ingram*, *Ib.*, 569; *Bradley v. Bradley*, *Ib.*, 571.

Appeal from allowance made by the master to one F. for services as executor:—Held, that in this case the costs of the petitioner must be paid as between solicitor and client out of the estate, including his costs of the appeal and cross-appeal from the report of the master in ordinary. *Re Fleming*, 11 P. R. 272.—Ferguson.

See *Hall v. Griffith*, 5 O. R. 478, p. 646; *Re Drumbrill*, 10 P. R. 216, p. 315; *Hutton v. Wanser*, 11 P. R. 302, p. 155.

#### VIII. LIEN FOR COSTS.

By the terms of the judgment pronounced at the trial costs up to the hearing were to be paid to the plaintiff out of the fund in Court, a reference was directed to take the accounts, and further directions and subsequent costs were reserved. The report of the officer to whom the reference was directed found the plaintiff indebted to the estate in a considerable amount, and a motion was made by the defendant Moffatt (pending an appeal from the report) to stay payment out of Court of the costs of the plaintiff up to the trial until after the hearing on further directions, in order that the amount found due to the estate by the plaintiff might be set off pro tanto against the costs awarded to the plaintiff:—Held, that the judgment pronounced at the trial gave the plaintiff and his solicitor a vested right to be paid out of the fund in Court prior to the defendant's equity to ask a set-off, and no set-off should be allowed to the prejudice of the solicitor's lien thus arising. A solicitor's lien having been asserted at the bar during the argu-

ment, an affidavit proving it was allowed to be put in subsequently, following the suggestion of Strong, V. C., in *Webb v. McArthur*, 4 Ch. Chamb. R. 63. *Dawson v. Moffatt*, 10 P. R. 366.—Boyd.

Where judgments were recovered in the same action by the plaintiff on his claim with general costs of action, and the defendant on his counter-claim with costs thereof, such claim and counter-claim arising out of the same subject matter, the judgment for counter-claim largely exceeding the former in amount, a set-off was allowed of so much of the money recovered by the defendant against the plaintiff on defendant's counter-claim as would cover the costs adjudged to the plaintiff on his recovery of judgment against the defendant, notwithstanding the claim of the plaintiff's solicitors to a lien on the costs adjudged to the plaintiff:—*Quære*, when a judgment, as in this case has been framed without directing a set-off, whether a Judge in Chambers has power to direct it to the prejudice of the solicitor, so as to vary the decree of the Court. *Brown v. Nelson*, 11 P. R. 121.—Dalton, *Master*.—Osler.

The Toronto agents of a deceased solicitor were held entitled to a lien on a sum of money in court to the credit of this matter, to which the solicitor was entitled for his costs, to the extent of their unpaid agency bill of charges in this matter, and it was ordered that their bill should be paid out of the fund in priority to the claims of the other creditors of the solicitor. *Re Ryan*, 11 P. R. 127.—Ferguson.

The plaintiffs sued for freight for the carriage of timber, and the defendants pleaded a counter-claim for neglect and delay in the carriage of the timber. The judgment at the trial was as follows: "The verdict will be for the plaintiffs for \$2,122, and for the defendants upon their counter-claim for \$1,420, and each party will be entitled to costs against the other, as if the statement of claim and counter-claim were separate actions, and I direct that judgment be entered accordingly."—Held, (reversing the decision of the Master in Chambers), that the judgments recovered by the plaintiffs and defendants must be treated as judgments in separate actions, and, therefore, that in setting off the judgments the claim for costs of the defendants' solicitors upon the judgment against the plaintiffs should be protected. *Canadian Pacific R. W. Co. v. Grant*, 11 P. R. 208—C. P. D.

An assignment was made by the mortgagor to a creditor of a portion of a fund in court, as to which litigation was pending between mortgagor and mortgagee as to their respective shares:—Held, that to the extent to which the solicitors of the mortgagor incurred costs in resisting and prevailing against the accounts brought in on behalf of the mortgagee to that extent their lien should precede the assignment. *Yemen v. Johnston*, 11 P. R. 231.—Boyd.

See *Hall v. Griffith*, 5 O. R. 478, p. 646.

#### IX. MISCELLANEOUS CASES.

Held, that it is the duty of a notary, when executing a deed, to explain to an illiterate grantor the legal and equitable obligations im-

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McArthur, 4 Chy.  
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1.—Dalton, *Master*

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*R. W. Co. v. Grant*.

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R. 478, p. 646.

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tion. (Henry, J., dissenting.) *Ayotte v. Boucher*,  
9 S. C. R. 460.

Deposit of client's money by solicitor to his  
own credit. Liability of bank. See *Bailey v.*  
*Jellett et al.*, 9 A. R. 187.

The general manager of a company had au-  
thority to do acts which occasionally required  
legal advice:—Held, that he had implied au-  
thority to retain a solicitor whenever, in his judg-  
ment, it was prudent to do so, but that such  
authority ceased on the suspension of the com-  
pany. *Clarke v. Union Fire Ins. Co.*—*Caston's*  
*Case*, 10 P. R. 339.—*Hodgins, Master in Ordinary*.

Where the directors of a company have power  
to appoint officers and agents and dismiss them  
at pleasure:—Held, that their appointment of a  
solicitor need not be under the corporate seal.  
*Id.*

It is preferable to have the proceedings under  
an order for winding up a company under 45  
Vict. c. 23, (Dom.), conducted by solicitors who  
are totally unconnected with the company to be  
wound up. *Re Joseph Hall Manufacturing Co.*,  
10 P. R. 485.—*Boyd*.

Where the plaintiff's solicitor made default in  
payment into court of the ten per cent. paid to  
him at the time of sale, under the conditions of  
sale:—Held, that the other parties entitled to  
the purchase money should not suffer thereby,  
but that the plaintiff's share should be charged  
with the deficiency. *Mulkins v. Clarke*, 11 P. R.  
350.—*Proudfoot*.

## SPECIAL CIRCUMSTANCES.

See SOLICITOR.

## SPECIAL EXAMINER.

The powers of the special examiner under G.  
O. Chy. 147, as to directing the production of  
documents, extend to examinations, under Rule  
285, O. J. Act. *Orpen v. Kerr*, 11 P. R. 128.—  
*Boyd*.

## SPECIFIC PERFORMANCE.

### I. GENERALLY, 654.

### II. CONTRACTS FOR THE SALE OF, OR RELATING TO LAND.

1. *Sales by Agents*, 654.
2. *Defects in Subject Matter of Contract*, 654.
3. *When Contract is Conditional*, 654.
4. *Absence of Common Intention*, 655.
5. *Fraud or Misrepresentation*, 655.
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8. *Other Cases*, 657.
9. *Practice*, 658.

### III. OTHER AGREEMENTS, 658.

### IV. COSTS, 659.

## I. GENERALLY.

The court must see its way very clearly before  
it will decree specific performance of a contract,  
and it must be satisfied as to the integrity and  
good faith of the parties seeking its special in-  
terference. Where incapacity and inadequacy  
go hand in hand, the court may refuse to enforce  
a contract, although the purchaser was guilty  
of no greater fault than making a hard and un-  
conscientious bargain. *Gough v. Bench*, 6 O. R.  
699.—*Chy. D.*

Per Strong, J.—According to the principles  
upon which a court of equity acts in carrying  
into execution by its decree such contracts and  
agreements as are properly the subject of its  
jurisdiction, the court will always execute the  
whole or such parts of the agreement as remain  
executory, but if the parties have thought fit  
before the institution of the suit to carry out any  
of the terms of the contract such executed por-  
tions will not be disturbed. *Peck v. Powell*, 11  
S. C. R. 494.

## II. CONTRACTS FOR THE SALE OF OR RELATING TO LAND.

### 1. Sales by Agents.

See *Ryan v. Sing*, 7 O. R. 266, p. 635; *Walms-  
ley v. Griffith et al.*, 10 A. R. 327, p. 656; *Mc-  
Carthy v. Cooper et al.*, 12 A. R. 284, p. 619.

### 2. Defects in Subject Matter of Contract.

M. having purchased lot 14 for a building lot  
resisted completion of the contract on the ground  
that a party wall of the width of nine inches had  
been built on the line between lots 14 and 15,  
which at some places came over on to lot 14 to  
the extent of six inches, and at another place to  
the extent of nine inches, and that he could not  
get rid of the wall without engaging in a lawsuit  
with the owner of lot 15, and that the party wall  
was not suitable to the class of buildings which  
he desired to put up, and was worse than useless  
to him. The evidence shewed the wall did not  
depreciate the value of the land:—Held, that this  
being so, and under all the circumstances of this  
case, specific performance must be decreed, though  
the matter complained of might have been pro-  
per for compensation, had such been sought under  
the condition of sale relating thereto. *Imperial  
Bank of Canada v. Metcalfe*, 11 O. R. 467.—*Fer-  
guson*.

### 3. When Contract is Conditional.

C. R. S., being the owner of certain leasehold  
property, wrote E. E. K., a land agent, a letter  
in these words: "Please call on J. J. R. He  
keeps a small shop \* \*. He resides in my  
house on P. street, and has been wanting to pur-  
chase it for some time. Tell him if he gives me  
\$235 cash at once I will send the papers to you  
for him, and he can pay over the money to you.  
Please write me by return mail." On the follow-  
ing day E. E. K. wrote J. J. R. as follows:  
"Mr. S. of Meaford wishes me to say that if you  
desire to purchase some property he owns on P.  
street, that if you give him \$235 cash he will  
send the deeds to me and deliver them to you.  
Your early reply will very much oblige." About

a month after an acceptance was endorsed on the latter letter in these words: "I hereby accept the above on the understanding that I pay no expenses," and it was signed by J. J. R. Upon an action being brought for specific performance by J. J. R. against C. R. S. it was:—Held, that the letter from C. R. S. did not contain authority to E. E. K. to enter into a contract for the sale of the property:—Held, also, that even if there had been no question as to the authority of E. E. K., the insertion of the words "on the understanding that I pay no expenses," in the acceptance prevented it from being considered an acceptance of the offer said to be contained in the letter of E. E. K. *Ryan v. Sing*, 7 O. R. 266. —Ferguson.

On the 26th January, 1882, McI. wrote to H. as follows: "A. McI. agrees to take \$35,000 for property known as McM. block. Terms—one-third cash, balance in one year at eight per cent. per annum. Open until Saturday, 28th, noon." On the same day H. accepted this offer in the following terms: "I beg to accept your offer made this morning. I will accept the property known as McM. block, being the property on M. street, for \$35,000, payable one-third cash on completion of title, and balance in one year at eight per cent. You will please have papers and abstract submitted by your solicitor to N. F. H., Esq., 22 D block, as soon as possible, that I may get conveyance and give mortgage." On a bill for specific performance the Court of Queen's Bench (Man.) decreed that H. was entitled to have the agreement specifically performed:—Held, Ritchie, C. J., and Fournier, J., dissenting, that there was no binding unconditional acceptance of the offer of sale, and therefore no completed contract of sale between the parties. *McIntyre v. Hood*, 9 S. C. R. 556.

#### 4. Absence of Common Intention.

R. wrote to O. "I have considered the matter of our conversation, and offer you \$800 for the property." O. replied: "I have your favour offering \$800 for the property (describing it). I have concluded to accept your offer." The evidence showed that at the prior conversation referred to in R.'s letter, R. was seeking to buy the property in question on terms of five or seven years' credit:—Held, that as the acceptance by O. was as of a cash offer, while R. did not intend to make any such offer, the contract could not be specifically enforced, the parties differing in their understanding of it. *Omnium Securities Company v. Richardson*, 7 O. R. 182.—Boyd. Affirmed in appeal. *Ib.* 185.

#### 5. Fraud or Misrepresentation.

The plaintiff negotiated with the defendants Griffith for the purchase of the lands in question, and at different times obtained from them writings giving him the option to purchase for \$20,000. Defendants Griffith set up that these negotiations were had with the plaintiff, as their agent, with a view of effecting through him a sale to the Independent Order of Odd Fellows at the same or a higher price for the defendants Griffith. After these options had been given to the plaintiff, he on the forenoon of the 17th February, 1882, agreed to sell to the Odd Fellows

for \$25,000, and same day he went to the defendants Griffith and offered to purchase for \$19,500 in lieu of the \$20,000 previously named. He was asked by the Griffiths whether the sale to the Odd Fellows was off, to which he replied that it was, and in the same conversation informed the Griffiths that he could not sell the property for \$20,000, as a reason why he should get it for \$19,500, for if sold to another, he, the plaintiff, would be entitled to a commission of \$500; and the Griffiths thereupon agreed to sell to plaintiff for \$19,500. Subsequently on the same day plaintiff entered into a contract in writing to sell to the Odd Fellows for \$25,000:—Held, that without reference to the question of agency to sell, the evidence showed that a sale to the Odd Fellows was in contemplation of both parties and was the foundation of the transaction, and (reversing the judgment of Proudfoot, J.), that the misrepresentation by the plaintiff in regard to the sale to the Odd Fellows, was such as disentitled him to a decree for specific performance. *Burton, J. A., dissentiente. Walmsley v. Griffith et al.*, 10 A. R. 327.

See *Gough v. Bench*, 6 O. R. 699, *infra*.

#### 6. Inadequate Consideration.

The plaintiff, an old woman of the age of 86, sued for rescission of a contract for the sale of land, and the defendant by way of cross-relief asked for specific performance. The evidence showed that at the time of contract there was inequality between the parties in that the plaintiff was not so well able to protect her own interests, as was the defendant to protect his; that she had capriciously and improvidently rejected the advice of her solicitor, who tried to persuade her to accept an offer more advantageous; that she was illiterate, and her capacity (weak at best) was affected by her extreme age, by her distress from want of money, and by drink; that the price offered by the defendant was clearly inadequate: that though it did not appear that the defendant was guilty of fraud, yet that probably the plaintiff did not comprehend the terms of the bargain:—Held, that under these circumstances, though no sufficient reason existed for interfering with the decision of the judge below, in dismissing the plaintiff's bill, specific performance of the agreement should not have been decreed:—Held, also, that inasmuch as all the evidence that could throw light upon the case, had, admittedly, been given, the fact that the issue of improvidence was not raised on the pleadings was immaterial. In such a case it is a mere matter of form to adapt the pleadings to the matters proved. *Gough v. Bench*, 6 O. R. 699—Chy. D.

#### 7. Delay in Carrying out Contract.

McA. filed an application with the proper government official for a license to cut timber upon two berths, and complied with the usual regulations, one of which was the payment of a certain sum for ground rent, and his application was duly forwarded to the commissioner of Crown lands: but owing to a defective survey it was impossible then to convey the berths. Subsequently the survey difficulty was removed, and his application as to one of the berths was ac-

See *B. Robertson*  
*Caskill v.*

ent to the defendant for the purchase for \$19,000, as was named. He then offered the sale to which he replied that he could not sell the land why he should not. Another, he, the defendant, a commission of the court agreed to sell the land to the plaintiff for \$25,000:—Held, that the question of the sale was a question of fact, and that a sale in contemplation of both parties of the transaction was binding. *Proudfoot v. Old Fellows*, 10 O. R. 191.—*Proudfoot*.

699, *infra*.

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of the age of 86, and for the sale of the way of cross-relief. The evidence showed that there was no intention on the part of the plaintiff to protect his own interest, but that he was merely a receiver, and that he was not to be more advantageously than his capacity to her extreme age, of money, and by the defendant, though it did not show guilt of fraud, it did not comprehend:—Held, that although no sufficient evidence was given with the decision, the plaintiff's agreement should be set aside, also, that the plaintiff could throw light on the evidence, been given, the evidence was not material. In such form to adapt the proved. *Gough v.*

out Contract.

with the proper license to cut timber with the usual payment of a and his application to the commissioner of defective survey it by the berths. Subsequently was removed, and the berths was ac-

cepted in the year 1861, but he having removed to the United States, never received any notice of such acceptance. In 1881 he first heard of the acceptance, and in 1884 sold all his interest therein for \$4,000. B. afterwards became entitled by subsequent assignments for value to all McA.'s interest, the assignments being duly filed in the crown lands department. McA. and B., in 1884 joined in a petition of right for the issue of the license, and the attorney-general demurred to the same:—Held, that there was no laches on the part of McA. in not enforcing a right which he did not know existed, and there was no intention on his part to abandon the right when he did become aware of it, as he treated it as a valuable asset. As between subjects a delay of four years would probably be under ordinary circumstances, a defence to a claim for specific performance; but under the facts in this case a vendor would not be allowed to set up such a defence. *McArthur v. The Queen*, 10 O. R. 191.—*Proudfoot*.

The defendant agreed to sell to the plaintiffs certain timber limits for \$25,000, stipulating that they should have a certain named time to inspect the property and arrange for payment of the price. Subsequently, and on the 20th of August, the plaintiffs wrote excusing themselves from not having carried out the purchase and asking for an extension of time for their accepting or refusing "your limits, one or two weeks if possible." In answer, G. suggested that it was not necessary to make any extension of time for the acceptance of the offer by the plaintiffs, and if they wrote stating they were satisfied with the timber, the quality and the price, and that they only wished the extension of time to make their financial arrangements, adding "and if you do this you can consider this letter authority for the additional time." The plaintiffs wrote accordingly, and the further time asked for expired on the 10th of September, but they failed fully to complete the purchase at the time named, and G. sold to the other defendant Miller:—Held, (affirming the judgment of Boyd, C.) that looking at the nature of the property, the subject of the contract, time would, without any stipulation in respect thereof, be regarded as essential; and it was intended by the parties that it should be so, and understood by them that it was so; and the subsequent correspondence showed it to have been expressly made so, and, therefore, that the plaintiffs were not entitled to a specific performance of the contract. *Crossfield v. Gould*, 9 A. R. 218.

When on a sale of lands the contract provided that the purchaser should be allowed ten days to make requisitions on title, and time was made of the essence of the contract, and the purchaser made certain objections within the ten days, and the answers not being satisfactory refused to complete, whereupon the vendor sued for specific performance and obtained the usual judgment:—Held, that the purchaser could not raise in the master's office fresh objections not raised within the ten days mentioned in the contract. *Imperial Bank of Canada v. Metcalfe*, 11 O. R. 467.—*Ferguson*.

#### 8. Other Cases.

See *Bingham v. Warner*, 10 P. R. 621, p. 659; *Robertson v. Pratte*, 10 O. R. 267, p. 659; *McCaskill v. McCaskill et al.*, 12 O. R. 683, p. 601.

#### 9. Practice.

If under R. S. O. c. 109, the court adjudicates upon a question of title between vendor and purchaser and directs the purchaser to carry out the contract, and the purchaser then fails to carry out the contract, it is unnecessary to bring an action for specific performance of the contract the requisite relief may be had on notice of motion for payment of the purchase money or in default a resale. *Re Craig*, 10 P. R. 33.—*Ferguson*.

By an agreement for the sale of certain land, the vendor was to give a good marketable title of which the purchaser was to satisfy himself at his own expense, and was not to call for any abstract of title, deeds, or evidences of title other than those in the vendor's possession. Subsequently on a reference in a suit by the vendor for specific performance, the defendant filed three objections to the title having reference to a small portion of the land, which were answered by the plaintiff, and the reference was proceeding when the defendant applied and obtained from the master leave to file other objections. On appeal *Proudfoot, J.*:—Held, that the master in ordinary had no jurisdiction to grant such leave, but on a subsequent application to the court he gave the leave required on terms. *Clarke v. Langley*, 10 P. R. 208.

See *Imperial Bank of Canada v. Metcalfe*, 11 O. R. 467, p. 659.

#### III. OTHER AGREEMENTS.

Held, by the Common Pleas Division (affirming the decision of Wilson, C. J. C. P.) A married woman cannot only bring an action against her husband in her own name, but she can also compromise it, or deal with it as she pleases, just as any other suitor can; and if the plaintiff and defendant have agreed to certain terms of settlement of such a suit, such contract can be enforced against the defendant, by the plaintiff suing in her own name without a next friend. And so in the present case where, by way of compromise of such a suit, the parties to it agreed that the plaintiff should execute a proper deed of separation containing certain covenants by her, in return for which the defendant should convey to the plaintiff certain lands and pay certain moneys:—Held, that the plaintiff was entitled to specific performance of this agreement: that it was not the separation which was being enforced, but the performance by the defendant of his contract. *Vardon v. Vardon*, 6 O. R. 719.

In consideration of a bonus granted by the plaintiffs to the defendants the latter agreed (1) to bring their railway from Ingersoll to some point on the line of the Canada Southern Railway not more than half a mile east of the present passenger station of the Canada Southern Railway at St. Thomas, and (2) to run all their passenger trains to and from a small station on Church street. The defendants performed the first part of the agreement, and also the second, so long as the Canada Southern R. W. Co. permitted the use of their line from the point of junction to the small station on Church street; but on the refusal of the other company to continue this privilege, the defendants discontinued the performance of this part of their agreement:



—Held, affirming the judgment of Ferguson, J., 7 O. R. 332, that this was not a case in which the defendants should be directed specifically to perform their contract as to the Church street station, but that the plaintiffs were entitled to a reference as to damages for breach thereof. *The Corporation of the City of St. Thomas v. The Credit Valley R. W. Co.*, 12 A. R. 273.

In an agreement for the sale of land from R. to P., the terms were inserted in these words: "Price \$1,000, \$200 cash, and balance in five yearly payments, interest at the rate of seven per cent., and covenant of P. to build house worth not less than \$4,000, to be commenced in a year from date and finally completed in two years \* \* \*." The \$200 was paid down, and R.'s solicitor prepared and tendered the deed (in which was inserted a covenant to build) and the mortgage to P. for execution. P. refused to execute them and R. brought an action for specific performance, which P. defended on the ground that the covenant to build was too vague and would not be enforced by the court:—Held, that the plaintiff was clearly entitled to the performance of the defendant's agreement to give a covenant to build a house of a certain value within a specified time. *Wood v. Silcock*, 50 L. T. N. S. 251, distinguished. *Robertson v. Patterson*, 10 O. R. 267.—Proudfoot.

The action was brought in the Chancery Division to obtain specific performance of a covenant to repair, or for damages:—Held, that it was really a Common Law action for specific performance of such a covenant could not be decreed, and the defendant was therefore entitled to the benefit of his jury notice. *Bingham v. Warner*, 10 P. R. 621.—Ferguson.

The plaintiff, a bookkeeper and accountant, entered into the following agreement with the firm of R. & Co. in the form of a letter addressed to himself: "In consideration of you advancing us the sum of \$3,000, we agree to give you collateral security, and to pay you interest on the same at the rate of eight per cent. per annum." The plaintiff advanced money for the benefit of the firm of R. & Co., but before he had received any security the firm made an assignment for the benefit of creditors. The plaintiff now sought to have it declared that he had a lien on the assets and effects of the firm, real and personal, and to have them assigned to him:—Held, that the agreement was incapable of specific performance by the court, for the reason that the terms were too vague and uncertain to be entertained. No kind of security was specified in the agreement, and parol evidence could not be given to supply the deficiency. The plaintiff was, however, entitled to have judgment at law against the firm of R. & Co. for the \$1,900 and interest and costs of action. *DeGear v. Smith*, 11 Chy. 570, followed. *Foster v. Russell et al.*, 12 O. R. 136.—Proudfoot.

See *Hughes v. Moore et al.*, 11 A. R. 569 p. 240; *Brundage v. Howard et al.*, 13 A. R. 337, p. 94.

#### IV. Costs.

Held, that inasmuch as the plaintiff succeeded in the only branch of the case argued before the Divisional Court, she should get her costs of that

appeal; but as to the rest of the suit, to save the expense and trouble of the apportionment, no costs should be given or received. *Gough v. Bench*, 6 O. R. 699.

#### SPIRITUOUS LIQUORS.

See INTOXICATING LIQUORS.

#### STAKEHOLDER.

See GAMING.

#### STAMPS.

ON BILLS AND NOTES—See BILLS OF EXCHANGE AND PROMISSORY NOTES.

Duties payable in stamps. Powers of Provincial Legislature. See *The Attorney General for Quebec v. Reed*, 10 App. Cas. 141.

#### STATEMENT OF CLAIM.

See PLEADING.

#### STATEMENT OF DEFENCE.

See PLEADING.

#### STATUTES.

- I. CONSTRUCTION, 660.
- II. PROSPECTIVE OR RETROSPECTIVE, 661.
- III. IMPERIAL ENACTMENTS, 661.
- IV. BRITISH NORTH AMERICA ACT 1867—See CONSTITUTIONAL LAW.
- V. PARTICULAR WORDS—See WORDS AND TERMS.
- VI. OTHER STATUTES—See THE SEVERAL TITLES.
- VII. SPECIALLY PLEADING A STATUTE—See PLEADING.

#### I. CONSTRUCTION.

The court will not be punctilious in adhering to the letter of the statute where there is a reasonable accuracy and no possible prejudice resulting from literal inaccuracy in the frame of a warrant to sell for arrears of taxes. See *Fitzgerald et al. v. Wilson et al.*, 8 O. R. 559.

The Fire Insurance Policy Act, R. S. O. c. 162 does not apply to property outside of Ontario. *Cameron v. The Canada Fire and Marine Ins. Co.* 6 O. R. 392.—Osler.

The statute 47 Vict. c. 20 (Ont.) does not apply to benevolent societies incorporated under R. S. O. c. 167. *Re O'Heron*, 11 P. R. 422.—Proudfoot.



result, to save the proportionment, no dividend. *Gough v.*

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R. 422.—*Proudfoot*.

Semble section 34 of C. L. P. Act, (R. S. O. c. 50 a. 39) has not been repealed by Rule 5 O. J. Act. *Cochrane Manufacturing Co. v. Lamon*, 11 P. R. 162.—*Rose*.

Per *Oslar, J. A.*—Semble, that the effect of R. S. O. c. 50 a. 352 is to make the Imp. Act 5 and 6 Vict. c. 97 a. 2, as to costs in cases of replevin on a distress for rent in arrear applicable to our practice. *Williams v. Crow*, 10 A. R. 301.

(General remarks on forms prescribed in various cases by Acts of Parliament. *Gemmell v. Garland*, 12 O. R. 139.—*Boyd*.

## II. PROSPECTIVE OR RETROSPECTIVE.

Held, that the "Married Women's Property Act, 1884," 47 Vict. c. 19, (Ont.), is not retrospective. *Scott v. Wye et al.*, 11 P. R. 93.—*O'Connor*.

See *McLachlin et al. v. Usborne et al.*—*Magee v. Usborne et al.*, 7 O. R. 297, p. 689; *Regina v. Lynch*, 12 O. R. 372, p. 74.

## III. IMPERIAL ENACTMENTS.

Held, that 18 Eliz., c. 5, which enacts that an informer shall sue either in person or by attorney is in force in this province, and therefore the plaintiff, an infant suing by his next friend, could not maintain an action for a penalty under the Election Act. *Garrett v. Roberts*, 10 A. R. 650.

Merchant's Shipping Act. See *Jones et al. v. Kinney et al.*, 11 S. C. R. 708, p. 638; *Sewell v. British Columbia Towing and Transportation Co.* 9 S. C. R. 527, p. 642.

## STATUTORY CONDITIONS.

See INSURANCE.

## STAYING PROCEEDINGS.

See PRACTICE.

## STEAMBOAT.

See SHIP.

## STOCK.

See CORAORATIONS.

Assessment of. See *Ex parte James D. Lewin*, 11 S. C. R. 484, p. 17.

Locus of bank stock. See *Hughes v. Rees*, 5 O. R. 654 p. 350.

## STOP ORDER.

H. M. C. being entitled to certain moneys in court, obtained certain advances from A. H. and

gave him a power of attorney to endorse any cheques issued to him by the court and repay himself. Subsequently H. M. C. obtained another advance from W. H. and assigned all his interest in the funds in court to H., which assignment was duly filed in the accountant's office and entered in the accountant's books and acted on for three years. W. H. had no notice of A. H.'s power of attorney. A. H. recovered a judgment against H. M. C. for the amount due him in December, 1883, and obtained a stop order in October, 1885. On a motion for payment out to A. H., which was resisted by W. H., who claimed all the moneys under his assignment, it was:—Held, that the court is the custodian of the fund and not the accountant, and that notice to the accountant of an assignment of funds in court is not tantamount to notice of the assignment of a trust fund to a private trustee, and that a stop order is the proper way of perfecting such a security. Per *Boyd, C.*—It was not necessary for A. H. to recover a judgment in order to entitle him to a stop order. Payments already made to W. H. under the assignment should not be interfered with, as the lodging of the assignment with the accountant was sufficient under the practice to justify payments out in the absence of any claim by A. H. under the first assignment. Per *Ferguson, J.*—A. H. having the earlier assignment was first in point of time, and prima facie would be preferred in law, and having obtained a stop order, which has been held to be the proper way of giving notice to the court, he thereby perfected his assignment. *Cottingham v. Cottingham*, 11 O. R. 294—*Chy. D.*

Since the coming into force of the "Creditors' Relief Act of 1880," March 25th, 1884, execution creditors who obtain stop orders on funds in Court do not obtain any priority thereby, but all must share ratably. As some of the provisions of the statute are to enable simple contract creditors to come in and obtain the position of execution creditors, they must have the same right with regard to funds in court as they would have with regard to funds in the sheriff's hands, and in any case where an execution creditor obtains a stop order there must be a reference to the master to ascertain if any other creditors desire to ask a share of the fund. *Dawson v. Moffatt*, 11 O. R. 484—*Chy. D.*

## STOPPAGE IN TRANSITU.

See SALE OF GOODS.

## STREAMS.

See WATER AND WATER COURSES.

## STREET.

See WAY.

Remarks on the serious consequences likely to arise from the constant changes in the names of streets in the city of Toronto. *VanKoughnet v. Denison*, 11 A. R. 699.

## STREET RAILWAY.

Action for damages to property and loss of fares through the unlawful and negligent removal of a house over a highway occupied by a street railway company. See *Toronto Street Railway Co. v. Dollyer*, 12 A. R. 679 p. 5.

See also *The Corporation of the County of York v. The Toronto Gravel Road and Concrete Co.*, 11 A. R. 765, p. 95.

## SUBPENA.

See COSTS.

## SUBROGATION.

See INSURANCE.

## SUBSCRIPTION FOR STOCK.

See CORPORATIONS.

## SUMMARY CONVICTIONS.

See JUSTICES OF THE PEACE.

## SUMMONS.

I. WRIT OF—See PRACTICE.

II. IN CHAMBERS—See PRACTICE.

## SUNDAY.

See TIME.

In an action upon a contract for the purchase of a horse, the statement of defence alleged that on Sunday the 19th of April the defendant drove out to the plaintiff's place for the purpose of exchanging a horse, and that on that occasion it was agreed, &c., (stating defendant's version of the bargain):—Held, that this statement was not sufficient to raise the defence of illegality under the Lord's Day Act, but as it was treated at the trial as tendering the proper issue, and as the jury found that the contract was made on a Sunday, the judgment for the plaintiff was set aside and a new trial granted, without costs, with leave to both parties to amend. *Crosson v. Bigley*, 12 A. R. 94.

## SUPERSEDEAS.

The plaintiff, on the sale of certain land to the defendant R., left in her hands a sum of \$200 of the purchase money as security against an execution in another action then in the hands of a sheriff against the plaintiff's lands. Subsequently the plaintiff appealed in that action and on doing so gave a bond with sureties conditioned to pay the debt and costs:—Held, reversing the judgment of the court below, that the perfecting and

allowance of such security operated as a writ of superseas of the writ of execution, not as a stay thereof merely; and that the plaintiff was therefore entitled to recover the balance of the purchase money from R. *O'Donohoe v. Robinson et al.*, 10 A. R. 622.

## SUPREME COURT OF CANADA.

## I. APPEALS TO.

1. *When Appeal will Lie*, 664.

2. *Factum*, 666.

3. *Practice*, 666.

4. *Costs*, 666.

5. *Other Cases*, 666.

6. *Payment Out of Court of Money Paid as Security for Appeal*—See PAYMENT.

## I. APPEALS TO.

1. *When Appeal will Lie*.

A petition was duly filed and presented by appellant on the 5th of August, 1883, under the "Dominion Controverted Elections Act, 1874," against the return of respondent. Preliminary objections were filed by respondent, and before the same came on for hearing the attorney and agent of respondent obtained, on the 13th October, from Mr. Justice Weldon, an order authorizing the withdrawal of the deposit money and removal of the petition off the files. The money was withdrawn, but shortly afterwards, in January, 1883, the appellant, alleging he had had no knowledge of the proceedings taken by his agent and attorney, obtained, upon summons, a second order from Mr. Justice Weldon rescinding his prior order of 13th October, 1882, and directing that upon the appellant repaying to the clerk of the court the amount of the security, the petition be restored, and that the appellant be at liberty to proceed. Against this order of January, 1883, the respondent appealed to the Supreme Court of New Brunswick, and the court gave judgment, rescinding it. Thereupon petitioner appealed to the Supreme Court of Canada.—Held, that the judgment appealed from was not a judgment on a preliminary objection within the meaning of 42 Vict., c. 39, s. 10 (The Supreme Court Amendment Act, 1879), and therefore not appealable. *King's County Election (Dom.)—Dickie v. Woodworth*, S. C. R. 192, followed. *County of Gloucester Election (Dom.)—Comment v. Burns*, 8 S. C. R. 204.

St. L. claimed of S. \$2,125.75, balance due on a building contract. S. denied the claim, and, by incidental demand, claimed \$6,368 for damages resulting from defective work. The Superior Court, on 27th March, 1877, gave judgment in favour of St. L. for the whole amount of his claim, and dismissing S's incidental demand. The judgment was reversed by the Court of Review on the 29th December, 1877. St. L. appealed to the Court of Queen's Bench, and on the 24th November, 1880, that court held that St. L. was entitled to the balance claimed by him, from which should be deducted the cost of rebuilding the defectively constructed work, and in order to ascertain such cost, the case was remitted to the Superior Court, by whom experts were ap-

pointed to ascertain the damage, and, on their report, the Superior Court, on the 18th June, 1881, held that it was bound by the judgment of the court of Queen's Bench, and deducting therefrom the balance of the amount awarded by the experts from the balance claimed by St. L., gave judgment for the difference. This judgment was affirmed by the Court of Queen's Bench, on the 19th January, 1882:—

OF CANADA.

Lie, 664.

Court of Money Paid in  
Appeal.—See PAYMENT.

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led and presented by August, 1883, under the Elections Act, 1874, respondent. Preliminary respondent, and before hearing the attorney appeared, on the 13th October, 1883, an order authorizing the deposit money and the files. The money was paid afterwards, in January, 1884, alleging he had had proceedings taken by him, upon summons, Justice Weldon rescinded the order, on the 13th October, 1882, and the appellant repaying the amount of the security and that the appellant Against this order the appellant appealed to the Superior Court of New Brunswick, and the court granted it. Thereupon the appellant appealed to the Superior Court of Canada from the judgment of the court of New Brunswick. The appellant pleaded that the amount of the note had been attached in their hands by one of A.'s judgment creditors and paid under the garnishee clauses of the Common Law Procedure Act of P. E. I., transcripts of ss. 60 to 67 inclusive, of the English C. L. P. Act, 1854. To this plea respondent demurred on the ground that the debt was not one which could be attached, and on the 5th February, 1883, the Superior Court gave judgment in favour of the respondent on the demurrer. No rule for judgment on the demurrer was taken out by the respondent. On the 19th March following an order was obtained to ascertain amount of debt and damages for which final judgment was to be entered, and judgment was signed for the respondent on the 2nd May following. The appellant then appealed to the Superior Court of Canada. On motion to quash for want of jurisdiction, it was contended on behalf of respondent that the appellants should have appealed from the judgment rendered on the demurrer on the 5th February, 1883, and within thirty days from

that date; but:—Held, that the judgment entered on the 2nd May, 1883, was the "final judgment" in the case from which an appeal would lie to the Supreme Court. *Roblee v. Rankin*, 11 S. C. R. 137.

## 2. Factum.

The plaintiff's factum, containing reflections on the judge in equity and the full court of New Brunswick, was ordered to be taken off the files of the court as scandalous and impertinent. *Vernon v. Oliver*, 11 S. C. R. 156.

## 3. Practice.

Held, that it is not necessary to serve a certificate of a judgment of the Supreme Court when the decree is not materially altered. See *Grassett v. Carter*, 6 O. R. 584.

The defendants succeeded at the trial, in the Divisional Court, and in the Court of Appeal. Pending an appeal by the plaintiffs to the Supreme Court of Canada, the defendants applied for payment out of court to them of a sum paid in by the plaintiffs representing the whole subject matter of the litigation:—Held, that the application was in the discretion of the court; that that discretion should be exercised in the same way as upon an appeal to the Court of Appeal; and that the application should therefore be refused, following *King v. Duncan*, 9 P. R. 61. *Canadian Land and Emigration Co. v. Township of Dysart et al.*, 11 P. R. 51.—*Ferguson*.

Payment of money out of court deposited for security for costs pending appeal to Supreme Court on undertaking of solicitors. See *Kelly v. Imperial Loan Co. et al.*, 10 P. R. 499.

The thirty days' time allowed for appealing to the Supreme Court of Canada under sec. 25 of the Supreme and Exchequer Court Act commences to run on the issuing of the certificate of the Court of Appeal. *Wainwright v. Griffith et al.*, 11 P. R. 147.—C. of A.

The trial of the action was stayed pending an appeal to the Supreme Court of Canada from the judgment of the Court of Appeal upon a question arising in the action as to the method of trial of the issues in this and a cross-action. *Conmee v. Canadian Pacific Railway Co.*, 11 P. R. 356.—*Dalton, Master—Galt*.

See *Shaw v. St. Louis*, 8 S. C. R. 335, p. 665; *Roblee v. Rankin*, 11 S. C. R. 137, *supra*.

## 4. Costs.

An order was made indemnifying the next friend of the infant plaintiffs out of their money for the costs of an appeal to the Supreme Court of Canada where the appeal was advised by more than one counsel, and one of the Judges of the Court of Appeal had dissented from the rest. *Cottingham et al. v. Cottingham*, 11 P. R. 13.—*Ferguson*.

## 5. Other Cases.

Held, *Spragge, C. J. O.*, dubitante, that an appeal will not lie from the order of a Judge of

125.75, balance due on the claim, and, on the 5th February, 1883, the Superior Court gave judgment in favour of the respondent on the demurrer. No rule for judgment on the demurrer was taken out by the respondent. On the 19th March following an order was obtained to ascertain amount of debt and damages for which final judgment was to be entered, and judgment was signed for the respondent on the 2nd May following. The appellant then appealed to the Superior Court of Canada. On motion to quash for want of jurisdiction, it was contended on behalf of respondent that the appellants should have appealed from the judgment rendered on the demurrer on the 5th February, 1883, and within thirty days from

the Court of Appeal, extending the time for appealing to the Supreme Court of Canada. *Neill v. Travellers' Ins. Co.*, 9 A. R. 54.

Held, that the Supreme Court on appeal will not reverse on mere matters of fact the judgment of the judge who tries an election petition, unless the matter of the evidence is of such a nature as to convey an irresistible conviction that the judgment is not only wrong, but is erroneous. *Montcalm Election—Magan v. Dugas*, 9 S. C. R. 93. See, also *Berthier Election—Genereux v. Cuthbert*, 9 S. C. R. 102.

This case coming before the court below on motion for judgment under the order which governs the practice in such cases, and which is identical with English Order 40, Rule 10, of the orders of 1875, the court could give judgment finally determining all questions in dispute although the jury may not have found on them at all, but does not enable a court to dispose of a case contrary to the finding of a jury. In case the court considers particular findings to be against evidence, all that can be done is to award a new trial, either generally or partially under the powers conferred by the rule similar to the English Order 39, Rule 40. The Supreme Court of Canada, giving the judgment that the court below ought to have given, was in this case in a position to give judgment upon the evidence at large, there being no findings by the jury interposing any obstacle to their so doing, and therefore a judgment should be entered against both defendants for \$80,000 and costs. *Sewell v. British Columbia Towing and Transportation Company (Limited) et al.*, 9 S. C. R. 527.

See *Burgess v. Conway*, 11 P. R. 514, p. 151.

#### SUPREME COURT OF JUDICATURE.

Per Armour and O'Connor, JJ. The Supreme Court of Judicature is not properly a court, and ought more properly to have been called the Supreme Council of Judicature. *Regina v. Bunting et al.*, 7 O. R. 118.

#### SURETY.

See PRINCIPAL AND SURETY.

#### SURRENDER

OF LEASE—See LANDLORD AND TENANT.

Of grant from the Crown. See *Moffatt v. Scratch*, 6 O. R. 564; 8 O. R. 147; 12 A. R. 157, p. 19.

Of insurance policy. See *Caldwell v. The Standard Fire and Life Ins. Co.*, 11 S. C. R. 215, p. 335.

#### SURROGATE COURT.

Costs of an appeal from the Surrogate Court to the Court of Appeal should be taxed on the scale of the court appealed from, as provided by

Rule 28 of the Court of Appeal, and not on the scale of County Court appeals. *Regan v. Waters*, 10 P. R. 364.—Osler.

In the case of an action transferred from a Surrogate Court to the High Court of Justice, the costs of the proceedings in the Surrogate Court previous to the transfer should be taxed on the scale provided by the rules of 1858, i. e., as nearly as possible on the County Court scale. *Re Harris*, 24 Chy. 459, and *Re Osler*, 24 Chy. 529, explained and followed. *Peel v. Peel*, 11 P. R. 195.—Boyd.

#### SURVEY.

DESCRIPTION OF LAND—See DEED.

Amendment of plan. See *In re Chisholm and the Corporation of the Town of Oakville*, 12 A. R. 225, p. 146; *In re the Hon. G. W. Allan*, 10 O. R. 110.

Surveyors field notes as evidence. See *McGregor v. Keiller et al.*, 9 O. R. 677, p. 243.

#### TABULAR

See COSTS—SOLICITOR.

#### TAVERNS AND SHOPS.

See INTOXICATING LIQUORS.

#### TAXATION OF COSTS.

See COSTS—SOLICITOR.

#### TAXES.

I. MUNICIPAL—See ASSESSMENT AND TAXES.

II. SALE OF LAND FOR—See ASSESSMENT AND TAXES.

III. AS BETWEEN LANDLORD AND TENANT—See LANDLORD AND TENANT.

#### TELEGRAMS.

CONTRACTS BY—See CONTRACT.

#### TELEPHONE.

Interference by wires of Electric Light Company with wires of Telephone Company. See *Bell Telephone Company v. Belleville Electric Light Company*, 12 O. R. 571, p. 326.

#### TEMPERANCE ACTS.

See INTOXICATING LIQUORS.

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Re *Osler*, 24 Chy.  
*Peel v. Peel*, 11 P.

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ND—See DEED.

See *In re Chisholm and*  
*of Oakville*, 12 A. R.  
G. W. Allan, 10 O.

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R. 677, p. 243.

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SE ACTS.  
NG LIQUORS.

## TENANT. See ESTATE.

## TENANT IN COMMON OF CHATELS.

See *Gunn v. Burgess*, 5 O. R. 685, p. 58.

## TENDER.

The action was to recover money as compensation for land expropriated, and for other relief. Defendants pleaded a defence in denial, and also a tender of \$400 and interest, but did not pay the amount into court:—Held, that the defence of tender without payment into court was a good defence under the O. J. Act, and a motion to strike out the defence, or to compel payment into court, or for judgment for the amount, with leave to proceed for a further amount, was refused. *Demorest v. Midland R. W. Co. et al.*, 10 P. R. 640.—Dalton, Master.

## TERMS.

See WORDS AND TERMS.

## TIMBER.

### I. RIGHTS OF TENANT FOR LIFE AND IN COMMON, 669.

### II. CONTRACT FOR SALE OF.

#### 1. Generally, 669.

#### 2. Damages for Breach of, 671.

### III. MISCELLANEOUS CASES, 671.

### IV. CROWN LICENSE —See CROWN LANDS.

### V. FLOATING TIMBER —See WATER AND WATER COURSES.

### I. RIGHTS OF TENANT FOR LIFE AND IN COMMON.

Held, following *Drake v. Wigle*, 22 C. P. 405, that a tenant for life in this country may cut down timber in the proper course of good husbandry, in order to bring the proper proportion of the land under cultivation, and perhaps destroy such timber, but that he cannot cut down timber even for the same purpose, and sell it. *Stammers v. Breakie*, 5 O. R. 603—Chy. D.

A tenant in common occupying the common property is not chargeable with the value of timber cut by him on such property during his occupancy. *Munsie v. Lindsay*, 10 P. R. 173.—*Mosgona, Master in Ordinary.*

### II. CONTRACT FOR THE SALE OF.

#### 1. Generally.

C. conveyed to H. certain land by a deed which contained the following reservation and covenant: "And the said party of the first part reserves to himself all the standing timber upon the said lands, excepting that which measures

eight inches through, and the said party of the second part, covenants with the said party of the first part, to give him five years from the date hereof to take the said timber off the said lands, with the right of entry upon said lands for the purpose of removing said timber":—Held, that C. was entitled to all the timber over eight inches in diameter. *Corbett v. Harper*, 5 O. R. 93—Chy. D.

The plaintiff contracted with the defendant, a dealer in lumber, to sell him 200,000 feet of 18 foot plank of red or white pine two inches thick and from six to twelve inches wide; "quality the same as he had supplied the previous year," to be paid for by acceptance at three months from dates of shipment. The lumber was to be shipped f. o. b., at the plaintiff's mills to such places as the defendant should direct. A shipment was made of some car loads which the defendant accepted. Subsequent shipments were made, some car loads of which were received and others rejected at Hamilton where the defendant carried on business:—Held, in an action for the price, that under the terms of their contract the inspections should have been made at the plaintiff's mills and (affirming the judgment of the Court below, 9 O. R. 566), that the defendant could not reject the lumber at Hamilton unless it was shown that the article delivered was not the article agreed to be delivered; and the evidence failed to shew that the description of the lumber mentioned in the contract was not substantially satisfied. Per *Burton and Osler, J.J.A.* Although in a contract for the sale of goods not then ascertained, words such as were here used as to quality would amount to a warranty that the article to be delivered should agree with that description there was not evidence to shew a breach of the contract in that respect: Therefore:—Held, that the defendant's only remedy was in damages for the inferiority of the article delivered.—*Semble*, per *Burton, J.A.*, assuming that the contract gave the purchaser the right of inspection and rejection at Hamilton, an acceptance and payment for one shipment would not preclude the defendant from rejecting subsequent shipments of the lumber that did not substantially answer the contract. *Dymont v. Thomson*, 12 A. R. 659.

By deed, dated 4th April, 1884, made between J., and S. & L., J. agreed to sell and S. & L. to purchase all the merchantable pine, suitable for the purpose, standing, lying, and being on certain described property, for a sum which was then named and paid. "Provided, however that the said timber and logs shall be cut and removed off said lot on or before the 4th April, 1884." The defendant B. (claiming through S. & L.) after the expiration of the time agreed upon, removed logs which J. had cut after the 4th day of April, 1884, and for this J. brought this action and recovered a verdict for \$125. B. moved against the verdict, on the ground that under the deed, and the assignment to him, he was the absolute owner of the timber, subject merely to such claim as the vendor might have against the vendee for breach of the covenant to remove the pine within the time named:—Held, (O'Connor, J., dissenting), that the agreement could not be construed as an absolute grant of the pine trees suitable for the business of the grantees, subject to a covenant by them to cut and remove the trees within ten years; but that it was a grant of

the pine subject to the condition that the timber and logs should be cut and removed off the property on or before the 4th day of April, 1884:—Held, also, that this condition applied as well to trees severed before as to those severed after the expiration of the term:—Held, per O'Connor, J., that the case was within the meaning of the law as decided by the court in the case of *McGregor v. McNeil*, 32 C. P. 538, and that the defendant was the absolute owner of the timber, with an affirmative license to cut and remove the same, which the vendor could not revoke, although the time within which the timber was to be removed had expired; though the vendor might have other remedies. *Johnston v. Shortreed et al.*, 12 O. R. 633.—Q. B. D.

See *Crossfield v. Gould*, 9 A. R. 218 p. 657.

## 2. Damages for Breach of.

M. contracted to deliver timber of a certain kind to the defendant at St. Ignace which to the knowledge of M. was intended to be transported by the defendant to Quebec for sale there. Part only of the timber was delivered, and in an action by M.'s assignees for the price thereof, the defendant counter-claimed for damages for non-delivery of the residue. There was no market for such timber at St. Ignace or at any place nearer than Quebec:—Held, affirming the decision of the Queen's Bench Division, 3 O. R. 603, that the market value of the timber at Quebec, less the cost of transportation, was the true measure of damages. *Hendrie v. Nelon*, 12 A. R. 41.

## III. MISCELLANEOUS CASES.

Pledge of timber limits to bank. Quebec regulations as to timber on Crown lands. See *Grant et al. v. La Banque Nationale*, 9 O. R. 411, p. 43.

See *Regina v. Dunn*, 11 S. C. R. 385, p. 528; *Dobell et al. v. Ontario Bank et al.*, 9 A. R. 484, p. 300.

## TIME.

### I. TIME OF THE ESSENCE OF THE CONTRACT, 671.

### II. COMPUTATION OF TIME, 672.

### III. REASONABLE TIME, 673.

### IV. TIME GIVEN TO PRINCIPAL—See BILLS OF EXCHANGE AND PROMISSORY NOTES.

#### I. TIME OF THE ESSENCE OF THE CONTRACT.

The plaintiff was lessee of certain premises, the lease having nearly a year to run, when he was on or about the 13th of January applied to on behalf of the defendant, the executor of the lessor, to surrender the remainder of his term, which he consented to do in consideration of \$250, agreeing to give up possession on the 1st of February. In consequence of negotiations between the parties interested, the plaintiff did not actually give up possession until the end of

February, he agreeing to deduct a month's rent as reserved in the lease. Possession was accepted by the defendant's agent, but the defendant refused to pay the consideration agreed upon, alleging as a principal ground for such refusal the non-delivery of possession on the day named:—Held, that time was not by the agreement made of the essence of the contract, and the delay formed no defence to an action for the sum agreed to be paid. *Dainty v. Vidal*, 11 A. R. 47.

On a sale of timber limits. See *Crossfield v. Gould*, 9 A. R. 218, p. 657.

#### II. COMPUTATION OF TIME.

Held, reversing the judgment of Armour, J., at the trial (Armour, J., dissenting), that in computing demurrage Sunday is to be reckoned as one of the days to be allowed for. "Days" mean the same as running days, or consecutive days, unless there be some particular custom. If the parties wish to exclude any days from the computation they must be expressed. *Gibson v. Michael's Bay Lumber Co. (Limited)*, 7 O. R. 746—Q. B. D.

Rule 455 O. J. Act, applies to the Chancery Division of the High Court of Justice. The service of a copy of an appointment to examine on the plaintiff's solicitor on a Sunday for a Monday is insufficient. *Loveice v. Harrington*, 10 P. R. 157.—Dalton, Master.

Sundays and holidays are excluded in computing the five days notice necessary in a short notice of trial. Short notice of trial served on Wednesday for Monday:—Held, bad. *O'Donnell v. O'Donnell*, 10 P. R. 264.—Osler.

The term "vacation" in G. O. Chy. 642, means Christmas as well as long vacation, and hence the former is not to be counted in the time within which an appeal from a master's report may be had under that order. Notice of appeal from a report dated 29th November, 1883, given on the 31st December, 1883, for the 7th January, 1884, is valid. *Blake v. Building and Loan Association*, 10 P. R. 153.—Boyd.

A notice served on Monday, 6th October, of an appeal to the Court of Appeal from a judgment given on the 4th of September, was held too late. *Wright v. Legs*, 10 P. R. 354.—Dalton, Master.

The thirty days' time allowed for appealing to the Supreme Court of Canada under s. 25 of the Supreme and Exchequer Court Act, commences to run on the issuing of the certificate of the Court of Appeal. *Walmley v. Griffith et al.* 11 P. R. 147—C. of A.

A summons issued within a month after the formal acceptance of office by a candidate for mayor of a city by taking the statutory declarations of qualification and office is in time, notwithstanding that it issued more than six weeks after the election, and more than a month after a speech accepting office made by the respondent at a meeting of electors, and certain other acts of a similar character, less formal than the statutory declaration. *Regina ex rel. Feiltz v. Howland*, 11 P. R. 265.—Dalton, Master.



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#### COMPUTATION OF TIME.

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153.—Boyd.

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*Watmsley v. Griffith et al.* 11

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*Regina ex rel.*—*Feiltz v. How-*  
—Dalton, Master.

The notice to the revising officer in this case  
was left with his clerk at his office during the  
absence from town of the revising officer on Mon-  
day, 28th June, and on his return on the after-  
noon of that day he was told what had been done,  
and that if he did not consider that sufficient the  
notice would be procured again and served on  
him personally, but he said what was done was  
sufficient:—Held, that the last day for service  
for the sittings for the final revision to be held  
12th July was Sunday, 27th June, but that under  
sec. 2, sub-sec. 2, 48 & 49 Vict. c. 40, (Dom.), the  
time was extended, and S. had all the next day,  
and that the notice was well given on Monday.  
*Re Simmons and Dalton*, 120 R. 505.—Proudfoot.

#### III. REASONABLE TIME.

See *Adamson v. Yeager*, 10 A. R. 477, p. 561;  
*Carvill v. Schofield*, 9 S. C. R. 370, p. 640;  
*Bulmer v. Brumwell*, 13 A. R. 411, p. 398.

#### TITLE.

I. SALE OF LAND—See SALE OF LAND.

II. COVENANTS FOR—See COVENANTS FOR  
TITLE.

III. CLOUD ON—See SALE OF LAND.

IV. IMPROVEMENTS UNDER MISTAKE OF TITLE  
—See IMPROVEMENTS ON LAND.

V. BY POSSESSION—See LIMITATION OF AC-  
TIONS.

VI. DENIAL OF TITLE—See ESTOPPEL.

VII. JURISDICTION OF DIVISION COURTS WHERE  
TITLE TO LAND IS IN QUESTION—See  
DIVISION COURTS.

VIII. OUSTING JURISDICTION BY CLAIM OF TITLE  
—See JUSTICES OF THE PEACE.

#### TOLLS.

See WAY.

#### TORT.

Joint liability of husband and wife. See  
*Barker v. Westover et al.*, 5 O. R. 116, p. 310.

#### TOWAGE.

See SHIP.

#### TRACTION ENGINE.

See *The Corporation of the County of York v.*  
*The Toronto Gravel Road and Concrete Co.*, 11  
A. R. 765, p. 95.

#### TRADE.

I. CONTRACTS IN RESTRAINT OF TRADE—See  
CONTRACT.

### TRADE MARKS.

II. INFRINGEMENT OF TRADE MARKS—See  
TRADE MARKS.

III. TRADE FIXTURES—See FIXTURES.

IV. SEPARATE TRADING BY MARRIED WOMAN  
—See HUSBAND AND WIFE.

#### TRADE MARKS.

G. carried on business in partnership with B.,  
a part of the business being the sale of a series  
of copy books designed by B., to which was  
given the name "Beatty's Head-line Copy Book."  
The partnership was dissolved by B. retiring,  
and receiving \$10,000 for his interest in the busi-  
ness. After the dissolution B. made an agree-  
ment with the Canada Publishing Co. to prepare  
a copy book for them, which copy book was pre-  
pared and styled "Beatty's New and Improved  
Head-line Copy Book," which the said company  
sold in connection with their business. G.  
brought a suit against B. and the company for  
an injunction and an account, claiming that the  
sale of the last mentioned copy book was an in-  
fringement of his trade mark. He claimed an  
exclusive right to the use of the name "Beatty"  
in connection with his copy book, and alleged  
that he had paid a larger sum on the dissolution  
than he would have paid unless he was to have  
the exclusive sale of these copy books:—Held,  
affirming the judgment of *Ferguson, J.*, 6 O. R.  
68, and of the Court of Appeal, 11 A. R. 402,  
*Henry and Taschereau, J.J.*, dissenting, that de-  
fendants had no right to sell "Beatty's New and  
Improved Head-line Copy Book" in any form,  
or with any cover, calculated to deceive pur-  
chasers into the belief that they were buying the  
books of the plaintiff. *The Canada Publishing*  
*Co. et al. v. Gage*, 11 S. C. R. 306.

The L. F. P. Co. published a newspaper  
called *The Commercial Traveller and Mercantile*  
*Journal*, which was known as *The Commercial*  
*Traveller*, and registered it under the Trade  
Mark and Design Act of 1879 as *The Commercial*  
*Traveller's Journal*. The company sold the paper  
and good-will to the plaintiff, and on the negoti-  
ations for the sale the plaintiff saw the defendant,  
who was then employed by the company as man-  
ager and editor, and who shewed him the assets  
of the paper, the printing contracts, &c., and  
recommended the purchase as a good investment.  
After the sale the defendant, who had retained  
the mail list of the subscribers to the paper, pub-  
lished a new paper called *The Traveller*, and  
used the list to send copies of his paper to some  
of the names contained therein. It was shewn  
in evidence that while the defendant was in the  
employ of the company he often used the word  
*Traveller* as designating the paper then known  
as *The Commercial Traveller*. In an action to  
restrain the defendant from infringing the plain-  
tiff's trade mark, it was—Held, that the title of  
the paper published by the defendant was an in-  
fringement of the trade mark of the plaintiff, and  
that the subsequent publication by the defendant  
of a newspaper under the name of *The Traveller*  
was calculated to mislead persons, and induce  
them to believe the plaintiff's paper was the pa-  
per referred to, *Carey v. Goss*, 11 O. R. 619.—Galt.

Held, also, that although the 4th section of the  
Trade Mark and Design Act of 1879, 42 Vict.

c. 22 (Dom.), requires registration of the trade mark before the proprietor can bring an action; and the 14th section provides for registration of an assignment, the latter section does not enact that registration shall be necessary to give effect to such assignment. An injunction was therefore granted. *Ib.*

B. et al., manufactured and sold cakes of soap, having stamped thereon a registered trade mark, described as follows: A horse's head, above which were the words "The Imperial;" the words "Trade Mark," one on each side thereof; and underneath it the words "Laundry Bar." "J. Barsalou & Co., Montreal," was stamped on the reverse side. D. et al. manufactured cakes of soap similar in shape and general appearance to B. et al., having stamped thereon an imperfect unicorn's head, being a horse's head, with a stroke on the forehead to represent a horn. The words "Very Best" were stamped, one on each side of the head, and the words A. Bonin, 145 St. Dominique St., and "Laundry" over and under the head. At the trial the evidence was contradictory, but it was shown that the appellants' soap was known, asked for and purchased by a great number of illiterate persons as the "horse's head soap."—Held, (Henry, J., dissenting) reversing the judgment of the Queen's Bench (appeal side) and restoring the judgment of the Superior Court, that there was such an imitation of B. et al.'s trade mark as to mislead the public, and that they were therefore entitled to damages, and to an injunction to restrain D. et al. from using the device adopted by them. *Barsalou v. Darling*, 9 S. C. R. 677.

In an action to restrain the infringement of a trade-mark registered under the "Trade Mark and Design Act of 1879":—Held, following *McCaul v. Theal*, 28 Chy. 48, that prior user can be given in evidence to invalidate the trade-mark. *Partlo v. Todd*, 12 O. R. 171.—Proudfoot.

Held, that the words "Gold Leaf" used in the plaintiff's trade-mark distinguished the flour made by the plaintiff from that made by any other person, and, as such, was a proper subject of a trade-mark within the language of section 8 of the Act. *Ib.*

Held, on the evidence that "Gold Leaf" was a common brand for patent flour in use before the registration of the plaintiff's trade-mark, and that the plaintiff had not the right to endeavour to attribute to that which he might manufacture a name which had been for years before a well-known and current name by which that article was defined, and that there must be judgment for defendant with costs. *Ib.*

The plaintiff having registered as a trade mark the words "Imperial cough drops" now sued the defendant for infringement thereof by selling confectionery under the name "Imperial Cough Candy":—Held, that inasmuch as the evidence showed that the word "Imperial" as a designation or mark for cough drops or candy was really public property, and a common brand or designation for candy long before the plaintiff's registration, the plaintiff had not the right to attribute to that which he might manufacture a name which had been for years before a well-known and current name by which that article was defined, and the action must be dismissed. *Partlo v. Todd*, 12 O. R. 171, followed. *Watson v. Westlake*, 12 O. R. 429.—Ferguson.

## TRAMWAY.

See STREET RAILWAY.

Accident upon. See *McFarlane v. Gilmour et al.*, 5 O. R. 302, p. 426.

## TRANSFERRING CAUSES

See HIGH COURT OF JUSTICE.

## TRANSIENT TRADERS.

See MUNICIPAL CORPORATIONS.

## TREATING.

See PARLIAMENTARY ELECTIONS.

## TRESPASS.

I. TO PERSONAL PROPERTY, 676.

II. TO REALTY, 676.

III. ASSAULT AND IMPRISONMENT, 678.

IV. INJUNCTION TO RESTRAIN—See INJUNCTION.

I. TO PERSONAL PROPERTY.

See *Schaffer v. Dumble*, 5 O. R. 716, p. 100.

II. TO REALTY.

A testator by his will directed his executors to pay all his debts, &c., out of his estate. Then followed specific devises of his estate to his wife, children, and nephews, and a direction to his executors to sell the chattels, excepting the household furniture bequeathed to his wife, and out of the proceeds to pay the debts and to invest the balance for the benefit of the wife and children. By a codicil he directed his executors, if necessary, to sell in the first place lot A, specifically devised as aforesaid, to pay off any debts or incumbrances against his estate; and in the event of such sale being insufficient to pay said debts, &c., then in the next place to sell and dispose of lot B, also so specifically devised. The executors before disposing of lots A and B, sold to defendant the growing timber on lot C, a lot specifically devised to the plaintiffs, the defendant purchasing in good faith and on his solicitor's advice that the executors had the right to sell to pay debts; and defendant entered and cut down and carried away the timber. Subsequently the defendant purchased the land from the mortgagees thereof, the land having been mortgaged by testator. The plaintiffs, at the testator's death, were under age, and did not become of age until after the trespass complained of, when they brought trespass against defendant claiming as damages the value of the timber so cut. There was no entry or possession taken by plaintiffs before action commenced.—Held, affirming the judgment of Ross, J., that by reason of there being no such

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LAW.  
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STRAIN—See INJUNC-

PROPERTY.  
O. R. 716, p. 100.

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the judgment of  
if there being no such

entry or possession the action was not maintainable. Per Cameron, C. J. To entitle the plaintiffs to recover either at law or in equity, an entry upon the land by the plaintiffs must have been made at a time when they had a right to make such entry to carry the legal possession with it:—Held, also, per Rose, J., (1) that the general language of the will was controlled by the codicil, and so the debts were not charged on the unappropriated estates; and therefore the executors had no power to sell the timber on the land in question: (2) that if a power of sale was given to the executors it could not be exercised until after the lands specifically appropriated had been sold; and, (3) that the purchaser, not shielded by sec. 30 of 29 Vict. c. 20 (Ont.), was bound to see that the power was rightly exercised. *Baker et al. v. Mills*, 11 O. R. 253—C. P. D.

B., the owner of a mill, subject to a first mortgage for \$4,000, held by one K., gave a second mortgage to plaintiffs. Subsequently B., being desirous of having the mill converted from the "Stone" to the "Roller" system, applied to M., manager of the Ontario Loan and Savings Co., for an advance of \$7,300, to enable him to pay off the mortgages and leave a surplus to be applied in part payment of the cost of reconstruction, which advance the company agreed to make, and a mortgage for that amount was duly executed by B. in favour of the company. B. thereupon entered into an agreement with defendants under which defendants were to reconstruct the mill for \$4,800, \$2,000 to be paid on completion of mill and balance in three equal annual payments, secured by a second mortgage on the property, and it was one of the terms of the said agreement that defendants should be furnished with a letter from M. agreeing to pay the \$2,000 on completion of mill. Defendants, without communicating with M., commenced work and did not ask him for such letter until after the work had progressed for several weeks. When applied to for such letter, M. informed plaintiffs that he had not agreed with B. to give a letter for any specific sum, but only for whatever balance there might be left out of said sum of \$7,300, after paying off prior incumbrances, and that after allowing for the amount of such prior incumbrances there only remained about \$1,200, which latter amount he was willing to undertake to pay on the mill being completed. Defendants, in the course of reconstruction, had taken out most of the old machinery and put in new, and made considerable alterations, and upon M. declining to undertake to pay \$2,000, they removed the new machinery put in and left the mill in a dismantled condition. At the time defendants commenced work the amount due on plaintiffs mortgage was about \$1,700. The mill, whilst in such dismantled state, was sold under power of sale in K.'s mortgage and only realized enough to satisfy it, and plaintiffs, contending that defendants by their acts had diminished the value of their security, and that B., the mortgagor, was insolvent, brought this action to recover damages to the extent to which their security was impaired. It appeared in evidence that M., besides being manager for the loan company, was also plaintiff's manager, and that he was aware that B. had made a contract with defendants for remodelling the mill, although he did not know the precise terms of such contract, and that he saw the work in progress and

raised no objection. At the trial the learned Chief Justice dismissed the action, holding (following *Baker v. Mills*, 11 O. R. 253) that plaintiffs, second mortgagees, not having the legal estate, and not being in possession, or entitled to possession, could not maintain any action:—Held, per Wilson, C. J., and Armour, J., that plaintiffs must fail, not on the ground upon which the learned Chief Justice at the trial dismissed their action, but upon the ground that they had by their conduct and acquiescence precluded themselves from bringing it. Per O'Connor, J., that plaintiffs must fail on both grounds. *The Western Bank of Canada v. Grey et al.*, 12 O. R. 68—Q. B. D.

Right to bring action for damages for trespass committed by Municipality. See *VanEgmond v. The Corporation of the Town of Seaforth*, 6 O. R. 599, p. 710.

See *Brooke v. McLean*, 5 O. R. 209, p. 70.

### III. ASSAULT AND IMPRISONMENT.

The plaintiff, during his initiation as a member of the defendant's lodge, in the presence of the principal officers and a number of members, constituting a full and perfect meeting, was injured through the rough usage of some of the members. It appeared that this and other proceedings were taken with the knowledge of all those who were present, and that somewhat similar proceedings had happened on the occasion of other initiations, and that they were allowed and not checked:—Held, that they must be taken to have been done with the consent of the corporate body, and that the defendants were liable in damages for the injuries sustained. *Kinver v. The Phoenix Lodge, I. O. O. F.*, 7 O. R. 377.—Wilson.

Held, that the discharge of the plaintiff from custody on habeas corpus was not a quashing of his conviction on a charge for unlawfully removing cordwood from an Indian reserve; and that the conviction remaining in force, and the defendant having had jurisdiction, the action, which was trespass for assault and imprisonment maliciously and without reasonable and probable cause, could not be maintained, but the action should have been on the case; but that even if the form of action was right, there was no evidence of want of reasonable and probable cause. *Hunter v. Gilkison*, 7 O. R. 735—Q. B. D.

Suspension of action until criminal charge disposed of. See *Taylor v. McCullough*, 8 O. R. 309, p. 7.

### TRIAL.

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## I. NOTICE OF TRIAL.

When a cause is postponed by the order of the judge at the assizes, upon the defendant's application, it is a remanet, and no notice of trial for the next assizes is necessary, under the rules of 1875 (37 Q. B. 528) and the O. J. Act. *Donovan v. Boulthée*, 10 P. R. 52. — Dalton, Master. — Wilson.

Service of notice of trial effected by leaving a copy of the same in the office of the defendant's solicitor before six o'clock, but after the solicitor and his clerks had left for the day, takes effect only from the time when the notice came to the knowledge of the solicitor. The practice laid down in *Consumers' Gas Co. v. Kiscock*, 5 Q. B. 542; *McCallum v. Provincial Ins. Co.*, 6 P. R. 101, held not to have been altered by the O. J. Act as to service upon a defendant's solicitor. *Davies v. Hubbard*, 10 P. R. 148. — Dalton, Master.

Sundays and holidays are excluded in computing the five days notice necessary in short notice of trial. Short notice of trial served on Wednesday for Monday: — Held, bad. *O'Donnell v. O'Donnell*, 10 P. R. 264. — Osler.

The original defendant dying pendente lite, the plaintiffs issued an order of revivor on the 22nd April, and served it on the defendants by order on the same day, and along with it a notice of trial for the 5th May, at Cornwall. The defendant moved to set aside the notice of trial as irregular: — Held, that the order of revivor was in force from its service, and as it would be confirmed by the lapse of twelve days upon the 4th of May, the notice of trial for the 5th of May was regular. *New York Piano Co. v. Stevenson*, 10 P. R. 270. — Dalton, Master.

The reply in this action contained two paragraphs, the first denying certain allegations in

the fourth paragraph of the defence, and the second joining issue upon the rest of the defence. Notice of trial was served with the reply. A motion to set aside the notice of trial was dismissed, because the affidavit filed in support of it did not state that no joinder was filed when the notice of trial was given: — *Semble*, the joinder of issue referred to in Rule 176 O. J. Act, is not a simple denial of a previous pleading. *Weller v. Proctor*, 10 P. R. 323. — Dalton, Master.

A notice of trial in an action brought in the Queen's Bench or Common Pleas Division given for a special sitting for the trial of actions in the Chancery Division is irregular, and will be set aside. *Grant v. Middleton*, 10 P. R. 585. — Dalton, Master.

Since the O. J. Act any one of the parties, plaintiffs or defendants, may give notice of trial. *Tinning et al. v. Grand Trunk Railway Co.*, 11 P. R. 438. — Dalton, Master.

The plaintiff delivered a simple joinder of issue upon the statement of defence and counter-claim: — Held, that this closed the pleadings, and that notice of trial served with it was regular. *Hare v. Canthorpe*, 11 P. R. 353. — C. P. D.

Where the plaintiff served in succession four notices of trial for the same assizes, all of which were set aside as irregular, with costs against him, and he was in default for non-payment of such costs, the action was stayed until they should be paid. *Stewart v. Sullivan*, 11 P. R. 529. — C. P. D.

*See Adair v. Wade*, 9 O. R. 15, p. 682.

## II. FEE ON ENTERING RECORD.

Where the trial of a cause was postponed till the next Assizes, defendants to pay the costs: — Held, that no second fee was payable to the deputy clerk of the Crown upon entry of the action for trial at the later Assizes, and that when so paid by plaintiff, such fee was not payable against defendants. *Morton v. Grand Trunk R. W. Co.*, 10 P. R. 62. — Wilson.

## III. POSTPONEMENT OF TRIAL.

An interpleader issue arising out of an action in the High Court of Justice was directed to be tried in a County Court pursuant to 44 Vic. ch. 7, sec. 1 (Ont.): — Held, that a motion to postpone the trial of the issue should have been made in the County Court. *London and Canadian Loan and Agency Co. v. Morphy*, 11 P. R. 86. — Dalton, Master.

The costs of moving to postpone a trial on account of the absence of a material witness, will be costs in the cause, where the party moving has made diligent efforts, &c., to secure the attendance. *Brown v. Porter-Knox v. Porter*, 11 P. R. 250. — Rose.

## IV. JURY NOTICE.

## 1. Omission to File.

The plaintiff omitted to file a jury notice with his last pleading, and applied ex parte to the

the defence, and the  
the rest of the defence  
with the reply. A  
notice of trial was dis-  
it filed in support of  
inder was filed when  
given:—Semble, the  
in Rule 176 O. J. Act,  
a previous pleading.  
323.—Dalton, Master

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Pleas Division given  
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regular, and will be set  
on, 10 P. R. 585.—

y one of the parties,  
ay give notice of trial.  
Bank Railway Co., 11  
P. R.

simple joinder of issues  
and counter-claims—  
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it was regular. *Hart*  
3.—C. P. D.

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v. Sullivan, 11 P. R.

D. R. 15, p. 682.

#### WRING RECORD.

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Morton v. Grand Trunk  
Wilson.

#### MENT OF TRIAL.

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on and Canadian Loan  
Co., 11 P. R. 86.—Dalton.

postpone a trial on ac-  
material witness, will  
here the party moving  
&c., to secure the at-  
ter—Knox v. Porter.

#### NOTICE.

to File.

to file a jury notice with  
applied ex parte to the

Master in Chambers for leave to withdraw the  
last pleading and re-file it with a jury notice.  
The leave was granted:—Held, on appeal, that  
when the plaintiff came to the court to be reliev-  
ed from his slip, he should have been called upon  
to shew that the case was one which should be  
tried by a jury, and that unless he had been able  
to do so the defendants should not have had  
their statutory right to have the case tried by a  
judge without a jury taken away:—Held, also,  
that notice of the motion should have been given  
to the defendant, in accordance with the spirit  
of Rule 406 O. J. Act. The appeal was treated  
as a substantive motion for leave to file the jury  
notice, and the order of the master was affirmed,  
without costs. *Powell v. City of London Assur-*  
*ance Co.*—*Powell v. Quebec Insurance Co.*, 10 P.  
R. 520.—Rose.

#### V. TRIAL BY JUDGE WITHOUT A JURY.

See *Williams v. Crow*, 10 A. R. 301, p. 147.

#### VI. REFERENCE OF MATTERS TO MASTER.

The plaintiff sued for alleged breach of a con-  
tract to sell and deliver a quantity of hay to be  
inspected. The plaintiff gave evidence of short-  
age and defective quality, and asked for a refer-  
ence as to damages; but the learned judge who  
tried the case refused the reference, and gave  
judgment for the defendant:—Held, that the  
matters in question were proper for trial by a  
judge, and that the plaintiff was not entitled to  
give *prima facie* evidence of a breach of contract  
and then have a reference as to damages. *Cook*  
*et al. v. Patterson*, 10 A. R. 645.

The defendant, having delivered ties to a rail-  
way company in excess of his contract, as he al-  
leged, arranged that such ties should be returned  
as received by the company on a contract with  
the plaintiff. In anticipation of such returns,  
and of payment therefor, the plaintiff paid the  
defendant \$1,000, and brought this action to re-  
cover the same, alleging that he never was able  
to procure returns or payment from the railway  
company, and that the consideration for the \$1,-  
000 had therefore failed. It was shewn in evi-  
dence that the plaintiff had, in a claim against  
the railway company for 19,883 ties, included  
3,260 delivered by the defendant, and that, the  
railway company disputing such claim, a settle-  
ment had been effected, the plaintiff accepting  
\$1,000 in full of his claim, and giving the com-  
pany a formal release of all demands:—Held,  
that, to the extent to which the ties were deliv-  
ered by the defendant on plaintiff's account, the  
latter could not, in view of the circumstances,  
allege failure of consideration; but that he was  
not bound by the settlement to pay for ties that  
were not delivered, and therefore that the deter-  
mination of the action depended upon the result  
of the inquiry directed as to the number of ties  
delivered by defendant; and an appeal from the  
judgment directing such inquiry was accordingly  
dismissed. The objection, that the judge at the  
trial should have himself decided the issue as to  
failure of consideration, instead of directing an  
inquiry before the master, is not one that the  
court will entertain. *Featherstone v. VanAllen*,  
12 A. R. 133.

#### VII. RIGHT TO HAVE TRIAL BY JURY.

##### 1. Generally.

In an action of seduction no appearance was  
entered, the plaintiff then filed a statement of  
claim to which no defence was made, and inter-  
locutory judgment was signed, and notice of as-  
sessment of damages given. The defendant did  
not appear at the trial and a jury was called who  
disagreed as to the amount of damages, and were  
discharged. The learned judge then tried the  
case himself without a jury, upon a fresh taking of  
evidence, and assessed the damages, and gave judg-  
ment for the plaintiff:—Semble, that under the  
O. J. Act and former practice, the learned judge  
in such an action had no power to dispense with  
the jury:—Quere, whether, in any event, a jury  
having been called and disagreed, they could be  
dispensed with, and a re-trial had without a new  
notice; but it was unnecessary to decide the  
point, as it was not satisfactorily established that  
the writ of summons had been served on the de-  
fendant; and he was therefore allowed to have a  
trial on the merits. *Adair v. Wale*, 9 O. R. 15.—  
C. P. D.

Since Rule 545, O. J. Act, an action is not to  
be transferred from one Division of the High  
Court of Justice to another, except on very strong  
grounds. In an action for the recovery of land,  
in which the writ issued from the Chancery  
Division, the jury notice served by the defend-  
ants was struck out, and a motion to transfer  
the action to another Division was refused. *Bank of British North America v. Eddy*, 9 P. R.  
468, does not since Rule 545, O. J. Act, afford  
any general rule of practice. *Masse v. Masse*, 10  
P. R. 574.—*Boyd*. Reversed, 11 P. R. 81.—*Chy. D.*

The Court of Chancery had, before the O. J.  
Act, exclusive jurisdiction in actions to establish  
wills, and its power to direct a trial by jury (R.  
S. O. ch. 40, sec. 99,) is continued in the High  
Court under sec. 45, O. J. Act. But the heir-  
at-law, the defendant, in such an action has not  
now in this Province an absolute right to a jury,  
and the Court refused to direct one on the issues  
raised herein. *Re Lewis—Jackson v. Scott*, 11  
P. R. 107.—Ferguson.

In an action brought in the Chancery Division,  
on behalf of the plaintiff and other creditors, to  
set aside an alleged fraudulent transfer of notes,  
&c., made to the defendants by the debtor, and  
for an injunction to restrain the defendants from  
negotiating them, the defendants served a jury  
notice, which the Master in Chambers refused  
to strike out. On appeal to Proudfoot, J., he  
allowed the appeal and struck out the notice,  
reserving leave to appeal to the Court of Ap-  
peal:—Held, that Rule 545, O. J. Act, was not  
intended to, and does not, interfere with the  
power of transferring actions from one Division  
of the High Court to another, nor with the right  
to give a jury notice in a proper case, nor with  
the existing modes of trial of particular actions.  
*Pearson et al. v. The Merchants Bank of Canada*  
*et al.*, 11 P. R. 72.—C. of A.

In an action for the price of goods sold and  
delivered, which was begun in the Chancery  
Division, the defendant's jury notice, which had  
been struck out, was restored, and the action  
was transferred to the Queen's Bench Division.  
*Masse v. Masse*, 10 P. R. 574, not followed, owing



to the judgment of the Court of Appeal in *Pawson v. The Merchants Bank*, 11 P. R. 72. *Herring v. Brooks*, 11 P. R. 15.—Ferguson.

I. brought this action against S. in the Chancery Division claiming (1) foreclosure of certain mortgages, (2) upon an open account, (3) damages for breach of a contract; and S. sued I. in the Queen's Bench Division for damages arising out of the same contract, with which also I.'s other claims were connected. On a motion to strike out a jury notice, S. offered to let I. have judgment upon the mortgages and the open account, with a reference as to the amounts, subject to a defence which he raised as to a contract by I. to purchase the property covered by the mortgages. Boyd, C., directed (1) the trial of an issue, at a sittings of the Chancery Division, as to the defence raised by S.; (2) that the claim for damages in this action should be tried by a jury at the same time and place as the cross-action; and (3) that I. should have judgment upon the mortgages and open account, with a reference, which was to be stayed pending the trial of the issue directed. *Irwin v. Sperry*, 11 P. R. 229.

The action was for the amount of a bill for medical attendance; no equitable issue was raised, and it clearly appeared that the only matter in dispute was the amount of the bill.—Held, a proper case for a judge in Chambers, under R. S. O. c. 50, s. 255, to strike out the jury notice. *Pickup v. Kincaid et al.*, 11 P. R. 445.—Ferguson.

Connec and McLennan became contractors for the construction of a section of the Canadian Pacific Railway. The agreement thereof stipulated that 90 per cent. of the work should be paid for during the progress thereof upon "the progress estimates" of the proper officer of the company, the remaining 10 per cent. to be paid on the completion of the contract, at which time the company alleged that they had discovered that by means of fraud the contractors had procured from their engineer progress estimates for sums greatly in excess of the work done and they claimed for overpayments about \$600,000. The contractors, on the 5th of October, 1885, sued out process in the Queen's Bench Division to recover \$200,000, the balance claimed by them as still due; and on the 31st of the same month the company sued out process in the Chancery Division against the contractors to enforce payment of the amount claimed to have been overpaid them. Issue was joined in the actions respectively on the 17th and 14th of November following. In the action in the Chancery Division the contractors gave notice for trial by a jury which, on application by the company, was struck out by the master in Chambers who also made an order refusing a motion made by the contractors to stay proceedings in the Chancery Division action until the determination of the questions in the other action. Thereupon the contractors appealed, and on argument before Boyd, C., their appeal was dismissed. The company moved for and obtained an order from the master in Chambers to stay all proceedings in the Queen's Bench Division action with liberty to the contractors to raise in the Chancery Division action by defence, set-off, counter-claim, or otherwise, all questions intended to be raised by them in the Queen's Bench Division action against which order the contractors appealed to Rose, J., who feeling bound by the decision of Boyd, C., affirmed

the order of the master. Held, reversing these orders, 11 P. R. 149, that the Court of Appeal had jurisdiction to entertain the appeals, and that a trial with a jury was the prima facie right of the contractors whose action was the earlier one, and that the orders complained of were not such as rested in the mere discretion of the Judge (Hagarty, C. J. O., hesitante.) Per Osler, J. A. even if the facts were such as would entitle the Judge at the trial to strike out the jury notice the present orders were premature. *Connec v. Canadian Pacific R. W. Co.*, and *The Canadian Pacific R. W. Co. v. Connec*, 12 A. R. 744.

## 2. Exclusive Jurisdiction of Court of Chancery.

Held, that the exclusive jurisdiction of the Court of Chancery in sec. 45 of the O. J. Act means its jurisdiction as exercised generally in dispensing equity, and not its exclusive as distinguished from its auxiliary jurisdiction. *Pawson et al. v. The Merchants Bank of Canada et al.*, 11 P. R. 72.—C. of A.

Held, that this was such an action as would, before the O. J. Act, have been in the exclusive jurisdiction of the Court of Chancery, and therefore it fell within s. 45, and should be tried without a jury. The practice laid down in *Hank of B. N. A. v. Eddy*, 9 P. R. 468, is still the proper practice. The question whether the order of Proudfoot, J., was appealable was not determined, as the appeal was dismissed. *Id.*

The action was brought in the Chancery Division to obtain specific performance of a covenant to repair, or for damages:—Held, that it was really a common law action, for specific performance of such a covenant could not be decreed, and the defendant was therefore entitled to the benefit of his jury notice. *Bingham v. Warner*, 10 P. R. 621.—Ferguson.

Action by two ratepayers, on behalf of themselves and all other ratepayers of A., against all the members of the municipal council of A., charging that the defendants, acting fraudulently and in collusion with the treasurer of A., continued him in office after it had come to their knowledge that he was a defaulter, and allowed him to receive further moneys, causing loss to the municipality:—Held, that the law attaches the liability of trustees to municipal councillors, and that it was sufficient to charge them as such without using the word "trustees": that the action was one in the former exclusive jurisdiction of the Court of Chancery, and a jury notice was therefore improper. *Morrow et al. v. Connor et al.*, 11 P. R. 423.—Proudfoot.

*Re Lewis-Jackson v. Scott*, 11 P. R. 107, p. 682.

## VIII. RIGHT TO BEGIN.

Defendants admitted policy, proofs of death, probate, &c., and accepted burden of proof at the trial, and claimed the right to begin:—Held, the plaintiffs had the right to begin notwithstanding such admissions. *Miller v. Confederation Life Assurance Co.*, 11 O. R. 120.—Q. B. D.

## IX. RIGHT TO REPLY.

The learned judge at the trial nonsuited, because he thought the agreement had not been



Held, reversing these the Court of Appeal the appeals, and that prima facie right of was the earlier one, and of were not such action of the Judge. e.) Per Osler, J. A. as would entitle the out the jury notice emature. *Conner v. and The Canada e*, 12 A. R. 744.

f Court of Chancery. e jurisdiction of the 45 of the O. J. Act exercised generally in its exclusive as dis y jurisdiction. *Par s' Bank of Canada*

an action as would. ave been in the ex Court of Chancery. in s. 45, and should The practice laid A. v. Eddy, 9 P. R. practice. The question adfoot, J., was appeal as the appeal was dis

in the Chancery Divi orformance of a covenant :—Held, that it was, for specific perform ld not be decreed, and re entitled to the bene *ingham v. Warner*, 10

rs, on behalf of them yers of A., against all pal council of A., charg ecting fraudulently and urer of A., continued one to their knowledge and allowed him to res ing loss to the muni law attaches the li- icipal councillors, and arge them as such with ees": that the action clusive jurisdiction of and a jury notice was row et al. v. Connor foot.

ott, 11 P. R. 107, p. 682.

TO BEGIN.

olicy, proofs of death ed burden of proof at the right to begin: the right to begin: missions. *Miller v. nce Co.*, 11 O. R. 120

TO REPLY.

he trial nonsuited, be reement had not been

properly proved, but allowed the case to go to the jury on the issue of fraud, the onus of which was on the defendants, and for assessment of damages. The defendant's counsel cross-examined one of plaintiff's witnesses on the question of fraud, and the plaintiff re-examined him upon the cross-examination:—Held, that by reason of such re-examination the plaintiff was not deprived of his right of calling witnesses in reply to the defendant's evidence of fraud; at all events, this was a matter for the judge at the trial, and also the plaintiff having had to open the case, the fact of the case going to the jury only on the issue of fraud and for the assessment of damages, did not deprive the plaintiff of the right to reply. *McDonald v. Murray*, 5 O. R. 559—C. P. D.

## XII. SUBMITTING QUESTIONS TO AND FINDINGS OF THE JURY.

It was objected that the representation had not been found to be false to the knowledge of the plaintiff company; but:—Held, that the question as put having been assented to by counsel on both sides as one the finding on which would be decisive, it was too late to take this objection; and the effect of the finding must be taken to be that defendant knew the representation, which was to goods of his own manufacture, to be false. *Star Kidney Pad Co. et al. v. Greenwood*, 50 R. 28.—Q. B. D.

In an interpleader issue it was alleged that the plaintiff (the claimant) had purchased a horse from S. B. S., a married woman carrying on business in her own name, the price of which was said to have been paid partly in a note of hand of S. B. S. and her husband, for money lent to them, and partly by a set-off of wages coming to plaintiff from S. B. S. On the completion of the purchase the plaintiff took the horse, together with a cutter and harness belonging to S. B. S., and was absent for two or three days. On his return he put the horse in the stable of S. B. S. as before, and fed it with her fodder, &c.—no other act was shewn to indicate a change of ownership before the animal was seized by the sheriff under a f. fa. goods issued against S. B. S.:—Per Burton and Patterson, JJ.A., affirming the judgment of the County Court, that there was not such a continued change of possession as to satisfy the requirements of the statute, R. S. O. ch. 118, and that the judge had rightly withdrawn the case from the jury. Per Hagarty, C.J.O., and Osler, J.A., there being a jury the evidence was such as to require the case to be left to them. *Pettigrew v. Thomas*, 11 A. R. 577.

An objection was taken to the charge, as being adverse:—Held, that the charge could not be complained of, for to give effect to the objection would be to compel the judge to submit the case to the jury, leaving them to apply the evidence without any assistance from him, which was not the practice in this province. At the close of the evidence, the plaintiff's counsel, without objection, put in the defendant's examination before trial. The plaintiff's counsel, in addressing the jury, read a portion thereof; and the learned judge, in his charge, read other portions:—Held, there could be no objection to the learned judge reading such other portions, as they were properly in evidence. *Scougall v. Stapleton*, 12 O. R. 206.—C. P. D.

## XIII. INFLUENCING JURY.

The defendant, in conversation with one of the jury panel, but not one of the jury called to try the case, said he hoped the jury would give the defendant the benefit of any doubt:—Held, not sufficient to justify the court in interfering with the verdict. *Vanmere v. Farewell*, 12 O. R. 285.—C. P. D.

The defendants objected that by reason of frequent interruptions and reading of text-books by plaintiff's counsel during the delivery of the judge's charge injustice was done defendants, and the jury improperly influenced thereby:—Held, that this was a matter for the judge at the trial, and it would have to be a very strong case for the court to interfere, and the judge had made no complaint. *McDonald v. Murray et al.* 5 O. R. 559—C. P. D.

## XIV. WITHDRAWING CASE FROM JURY.

See *Ryan v. Canada Southern Railway Co.*, 10 O. R. 745, p. 585.

## TRUSTS AND TRUSTEE.

- I. NOTICE OF TRUST, 686.
- II. CREATION OF TRUST, 687.
- III. EXECUTED OR EXECUTORY, 688.
- IV. RESULTING TRUST, 688.
- V. TRUSTEES.

1. *Appointment of*, 689.
2. *Duties and Liabilities*, 689.
3. *Compensation and Allowance*, 691.
4. *Liability for Acts of Co-Trustee*, 692.
5. *Powers of*, 693.
6. *Of Infant*—See INFANT.
7. *Of Religious Institutions*—See CHURCH.
8. *School Trustees*—See PUBLIC SCHOOLS.
9. *Limitation of Actions Against*—See LIMITATION OF ACTIONS.

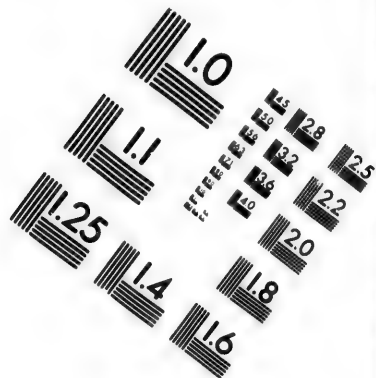
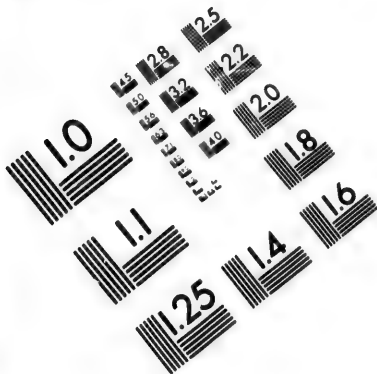
## VI. CESTUI QUE TRUST.

1. *Right to Possession of Property*, 694.
2. *Following Trust Moneys*, 695.
3. *Parties to Actions*—See PLEADING.

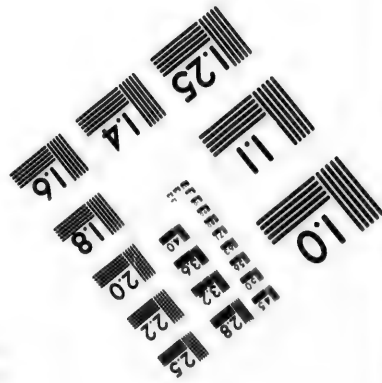
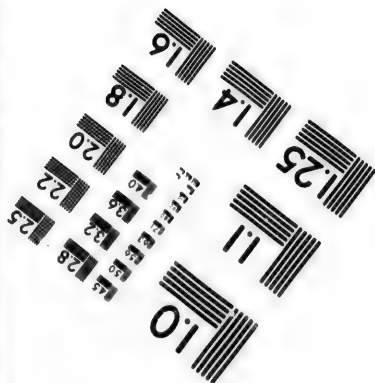
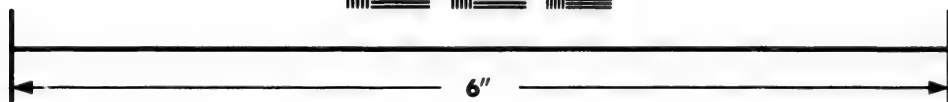
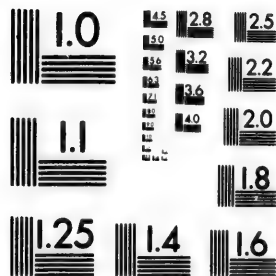
## VII. MISCELLANEOUS CASES, 695.

### I. NOTICE OF TRUST.

The plaintiff placed in the hands of one J. a practising solicitor, a mortgage given to the plaintiff by one R., together with a discharge thereof duly executed, for the purpose of enabling J. to receive payment of the mortgage money, which R. was borrowing from a loan company, and which it was arranged, between the plaintiff and J., in the presence of the local manager of a bank of which J. was the solicitor, should be deposited by the solicitor in such bank to the credit of the plaintiff, and a deposit receipt obtained therefor. J. did receive the money by a cheque of the loan company, amounting with interest to \$6,455, which he deposited in the bank to his private account. About ten days afterwards he drew upon his account for \$3,000, which



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he deposited in the same bank to the credit of the plaintiff, obtained a deposit receipt therefor in favour of the plaintiff and transmitted the same to the plaintiff on the 26th of August, 1881, telling the plaintiff in his letter that "the balance will be sent next week." He drew upon the fund for his own purposes, and died, without rendering any account, on the 4th September following:—Held, that the bank was not affected with notice of the money so deposited being trust moneys, so as to render the bank liable for J.'s misappropriation thereof. After the deposit of the plaintiff's money J. recovered a sum of \$1,182.95 for the defendant S. as her solicitor, which he also deposited in the same account on the 24th of August, 1881. Up to the time of J.'s death the amount at his credit always exceeded this sum:—Held that the moneys so deposited by J. had been held by him in a fiduciary character, and might be followed by B. & S.; but (in this reversing the judgment of the court below) as between the plaintiff and S., that S. had a first charge upon the sum at the credit of J. for the full amount of her deposit, and that the balance was applicable to the discharge of the plaintiff's demand. The bank claimed the right to charge against the account in priority to the claims of the plaintiff and S. cheques and notes of J. presented or maturing after notice to the bank of J.'s death:—Held, that they could not do so, and in consequence of having made such claim both in this court and the court below they were refused their costs. *Bailey v. Jellett et al.*, 9 A. R. 187.

The plaintiff, who was cestuique trust of certain lands held by B. & P. under a settlement which provided against anticipation, became a party to an instrument, in which B. & P. were named as parties, but did not execute, which amongst other things, declared that B. & P. had no real interest in certain lands which had been allotted to and were subsequently granted to them by a patent from the Crown, in which they were described as trustees for the plaintiff, for the purpose of making compensation for a deficiency in the settled estate; and that the person really entitled to such compensation was her husband, G. W. F. Subsequently B. and P. executed a similar declaration and afterwards G. W. F. joined with them in a conveyance of these lands to a bona fide purchaser (E.), under whom the defendants claimed:—Held, (affirming the judgment of Boyd, C. Galt, J., dissenting), (1) That the lands granted as compensation were subject to the terms of the settlement; (2) That the plaintiff's declaration in favour of her husband was inoperative in face of the restraint upon anticipation; and (3) that the terms of the grant from the Crown were sufficient to put E. on inquiry, and that he and the defendants must be taken to have had notice of the settlement, and the plaintiff was therefore entitled to recover. Per Galt, J.—the patent granting the compensation described B. & P. as trustees of the plaintiff, but did not grant the lands to them as such, and it could not be assumed, in the face of the declaration as to the title of G. W. F., that the plaintiff was the party entitled to such compensation. *Foott v. Rice*, 4 O. R. 94, affirmed. *Foott v. McGeorge et al.*, 12 A. R. 351.

## II. CREATION OF TRUST.

A testator having disposed of one third of the residue of his estate, real and personal, devised

and bequeathed the remainder to J. C., to hold to him, his heirs, executors, administrators, or assigns for ever in trust for the benefit of the testator's two sisters, and with all reasonable expedition to convert the same into money, and apply the same, or the proceeds thereof for the benefit of the said two sisters as he should consider just. And he directed that his other trustees should not enquire into or interfere with such distribution as J. C. might choose to make among the said two sisters, except when their concurrence should be necessary for conformity. J. C. predeceased the testator:—Held, that the above was in substance an imperative declaration of a trust of the whole remainder for the equal benefit of the two sisters with a discretionary power reposed in the trustee as to its mode of execution, and the court would undertake to discharge vicariously what could not otherwise be done, owing to J. C. predeceasing the testator, by referring it to the master to ascertain the proper mode of carrying out the directions of the will. Re *Charteris*, 25 Chy. 376 commented on. Order made referring it to the master to work out a scheme for the application and distribution of the fund. *Charteris v. Charteris et al.*, 10 O. R. 738.—Boyd.

See *Glass v. Burt et al.*, 8 O. R. 391, p. 297; *Kennedy et al. v. The Corporation of the City of Toronto*, 12 O. R. 211, p. 86.

## III. EXECUTED OR EXECUTORY.

See *Ferris v. Ferris*, 9 O. R. 324, p. 213.

## IV. RESULTING TRUST.

A resulting trust arises only in favour of a party paying the whole or an aliquot part of the purchase money; and in such case the trust is of a part of the purchased estate proportioned to the sum paid. No such trust arises from the circumstances of a man making advances on behalf of another who has agreed to buy the estate. *Sanderson v. McKercher*, 13 A. R. 561.

The defendant, whose daughter had married a brother of the plaintiff and who was an executor named in the will of S., the father of the plaintiff, took a more than common interest in the settlement of his testator's estate. In consequence he suggested to the plaintiff the desirability of his purchasing the estate of one G. situated near the S. homestead; as by so doing the plaintiff could retain the G. farm leaving the homestead to be equally divided between his two brothers: saying in answer to plaintiff's objection of want of means that he, defendant, would assist him with his payments. The purchase was accordingly effected, and plaintiff and defendant paid up the purchase money, but not in any agreed proportions, some of defendant's advances being made partly in cash and partly in kind and the conveyance was made to the plaintiff, the defendant subscribing as the witness and retaining possession of the deed. On an attempted settlement of their respective rights the defendant under the circumstances insisted that he and the plaintiff had purchased on joint account and that there was a resulting trust in his favour as to a moiety of the land and that he was entitled to the then value thereof and on proceedings taken by the plaintiff,

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Armour, J., gave judgment for the defendants. On appeal to this Court:—Held, (Hagarty, C.J.O., dissenting,) that on the evidence there was not a resulting trust; that all defendant could claim was a lien for the amount advanced by him; and a reference was directed to take the account and if the amount found due should not be paid in six months that the estate should be sold, the amount due defendant paid to him and the surplus, if any, paid to the plaintiff. *Ib.*

## V. TRUSTEES.

### 1. Appointment of.

A testator devised certain properties to H. F. M., J. H. M., and D. M., as tenants in common, and charged the same with \$100,000 to be paid by them to his son, and two daughters, married women, share and share alike, through his wife M. M., as trustee as therein mentioned; and directed that at the death of M. M. the said \$100,000 should be held by the said devisees and their survivors on the trusts of the will, "unless my said wife shall have previously appointed, by will or otherwise, any other person or persons to be a trustee in her place, which I hereby authorize and give her power to do." On November 5th, 1873, M. M., by deed professed to nominate and appoint L. R. and J. U., to be trustees in her place under the will, and afterwards by another deed of October 6th, 1877, again appointed L. R. and J. U. to be such trustees:—Held, that the will only authorized M. M., to appoint a trustee to be such after her death, and neither of the appointments of L. R. and J. U. were authorized by the will:—Held, however, that although R. S. O. c. 107, s. 30, could not be invoked to authorize either appointment, since it did not come into force till December 31st, 1877, yet under 40 Vict. c. 8, s. 30, (Ont.), assented to on March 2nd, 1877, the latter appointment was a good and valid one, for that Act applies to the case of a trustee appointed before the passing of it, who desires to be discharged from the trust, and consequently money paid to M. M. as such trustee, after the appointment of October 6th, 1877, did not discharge the debt. 40 Vict. c. 8, s. 30, (Ont.), is very broad in its language, and a trustee who has from the beginning been a sole trustee has, under it, the same position and power as a last retiring trustee, or a sole surviving trustee:—Semble, that 40 Vict. c. 8, s. 30, (Ont.), is prospective and not retrospective in this sense, that it would not make valid the appointment of trustees made prior to its passing without authority:—Held, also, that the fact that L. R. and J. U. were the husbands of the female cestuis qui trust, although it appeared from the will that the testator intended that the legacies should be free from the control of any present or future husband, did not make the appointment bad, although it might be that if the court were appointing trustees, the husbands would not be appointed. *McLachlin et al. v. Osborne et al.*; *Mayce v. Osborne et al.*, 7 O. R. 297.—Ferguson.

### 2. Duties and Liabilities.

C. M., a solicitor, invested money of T. in a third mortgage of the E. property. Afterwards, in 1862, the property was put up for auction under a decree for sale at the suit of the first mort-

gagor. A. M. held the mortgage on the property next after the first mortgage. Finding that, owing to the great depreciation of the value of the E. property, it would, if sold then, scarcely fetch enough to pay off the first mortgage, it was agreed between C. M. and A. M. that C. M. should, out of his own moneys, buy in the property by paying off the first mortgage, and then hold the same in trust to sell, and out of the proceeds to first repay himself the amount so advanced by him, with interest from the date of the sale, then to pay A. M. his claim on the property, with interest, and then to pay T. his claim, with interest. C. M. accordingly advanced sufficient to buy in the property as agreed. In 1864 a formal deed of trust was drawn up and executed by the first mortgagee, and by C. M., A. M., and T., whereby the property was conveyed to C. M. on trust to sell "without delay," and apply the proceeds as aforesaid, and giving him power to lease in the meanwhile, and making him answerable only for loss resulting from his own "wilful neglect and default." C. M. leased the property from time to time, but he did not sell it until 1883, when T.'s executrix brought an action charging him with default and breach of trust, and claiming an account and damages. The evidence shewed that the property had all through been of a very unsaleable kind, consisting of a farm, very stumpy and badly fenced, and an old mill, which had quite lost its value. It also appeared that C. M. had never advertised the property for sale, but at the same time that it was well known in the neighbourhood that it was for sale, and that it was not the sort of property that was likely to be bought by a stranger. There was, also, no positive evidence that at any time C. M. could have effected a more advantageous sale than that he effected in 1883; and it appeared that up to 1880 neither A. M. nor T. had complained of the delay, but if anything, acquiesced in it:—Held, under all the circumstances of the case, affirming the decision of the Master in Ordinary, that C. M. was not proved to have been guilty of neglect and default (as trustee) nor did the evidence afford any basis for assessing damages against him. *Taylor v. Magrath*, 10 O. R. 669.—Boyd.

It appeared that in 1880, on T.'s solicitors demanding an account from C. M. of his dealings with the trust estate, C. M. employed S., a professional accountant, to make out from his books a detailed account, and S., in so doing, applied receipts from time to time in liquidation of the principal moneys due to C. M. under the trust deed, instead of applying them in the first instance in liquidation of the interest accruing due thereon, and the account so drawn up was delivered to the solicitors of T. An affidavit of C. M., moreover, was produced in the master's office, wherein he stated that this account was correct, and made out under his supervision, and he spoke to the same effect in an examination taken de bene esse in this action. After judgment in this action, which referred it to the Master in Ordinary to take the account of C. M.'s dealings as trustee, and before the same was taken into the master's office, C. M. died, and on return of the master's warrant to bring in the account C. M.'s executors brought in a new account, differing from that rendered as aforesaid to T.'s solicitors, in that they applied receipts in liquidation in the first instance of the interest accruing on C. M.'s claim,

which method made a difference in the result of many thousand dollars. No account had been rendered to A. M.:—Held, that as against T., C. M. and his executors were bound by the account previously rendered to T.'s solicitors and by the method of appropriation of receipts to principal contained therein, but were not so bound as against A. M., as against whom the account brought in by C. M.'s executors could stand. In the account thus delivered in 1880, after the principal moneys were satisfied by application as aforesaid of receipts, interest was charged at ten per cent. on all subsequent receipts against C. M.:—Held, that this was an error in the account, and the executors of C. M. were not bound by it, and to this extent the account might be rectified. *McGregor v. Gaulin*, 4 Q. B. 378, considered and distinguished:—Held, by the Master in Ordinary, that the amounts paid by C. M. to a professional land agent in connection with the sale of the property, and a certain sum paid by C. M. to a professional accountant for making up the account delivered in 1880 should be allowed to him in his accounts. But that sums paid by C. M.'s executors to a professional accountant for making up the account brought in by them into the master's office, and a certain sum paid to C. M.'s solicitors on account of their costs in the action should not be allowed to C. M. in his accounts:—Held, also, by the Master in Ordinary, that C. M., as trustee solicitor, was not entitled to profit costs, but, nevertheless, he was entitled to a commission of five per cent. on the amounts coming to A. M. and T., from which, however, must be deducted a certain sum paid as commission to a land agent for effecting the sale of the property, since double commissions cannot be allowed. *Id.*

One L., by her will, gave her real and personal property to her brothers and sisters, share and share alike, and appointed L. and E. executors. L. and E. converted the estate into money, and invested the proceeds on mortgage security, and afterwards as certain of the legatees came of age paid them over their shares, but paid the plaintiffs' shares, they being infants, to one F. who, with the concurrence of their parents, had been appointed their guardian by the Surrogate Court. F. absconded with the money. The infants now suing L. and E. by their next friend for the amount of their shares:—Held, that by the actions of the executors the moneys in their hands had become trust funds of which they were trustees, and that the plaintiffs were entitled to judgment. *Huggins et al. v. Law et al.*, 11 O. R. 565.—Ferguson.

The law attaches the liability of trustees to municipal councillors. See *Morrow v. Connor et al.*, 11 P. R. 423, p. 465.

Liability for interest. See *In re Honsberger—Honsberger v. Kratz*, 10 O. R. 521, p. 257.

See *Bratty v. North Western Transportation Co.*, 11 A. R. 205, p. 116.

### 3. Compensation and Allowance.

Held, in this case, that the plaintiff was entitled to the account asked, and that as regarded the increase or profits in the dealings with the capital of the estate, these should be

proportioned in accordance with the amount of such capital owned respectively by the testator and the defendant, W. B. D.; and the defendant, W. D. B. should be allowed a liberal remuneration for his exertions, care, time, and trouble in the management of the estate, which appeared to have been skilful and successful. *Burn v. Burn*, 8 O. R. 237.—Ferguson.

It is incident to the office of a trustee that the trust property shall reimburse him for his expenses in administering the trust; and a clause so indemnifying a trustee is infused into every trust deed; and the statute R. S. O. c. 107, s. 3, does little more than what Courts of equity had been accustomed to do without any statutory direction. Therefore a trustee who had been induced by a settlor to accept a trust under an instrument void by the law of the settlor's domicile, is entitled to be reimbursed by such settlor for all his expenses incurred in the execution of the trust. *Hughes v. Rees*, 10 P. R. 301.—Hodgins, Master in Ordinary.

Semble, that though the trust deed in question was invalid, and notwithstanding *Smith v. Dresser*, L. R. 1 Eq. 651, 35 Beav. 378, yet as against one who himself assisted in creating the trust, a trustee acting under it would have been entitled to expenses incurred in respect of it but upon the facts stated in the report, it was held that the sums claimed were not shewn to have been incurred in respect of the trust deed. *S. C.*, 9 O. R. 198.—Proudfoot.

See *Taylor v. Magrath*, 10 O. R. 669, p. 691.

### 4. Liability for Acts of Co-trustee.

A., B. and C., the three executors under a will, sold certain real estate of the testator. C., who was entitled to the annual income of the proceeds thereof, took the most active part in the management of the estate, as the others lived at a distance, and employed a solicitor who received two sums \$980 and \$1580, part of the proceeds of said sale, the former in January, 1876, and the latter in February, 1882. Both the other executors were aware of his employment and that these sums were in his hands. In February, 1884, the solicitor absconded causing a loss to the estate of \$1960, the balance then in his hands. In the will there was a clause "that each (of the executors) should be responsible for his or her acts only, and irresponsible for any loss unless through wilful neglect or default":—Held, that all three were equally liable and must make good the amount to the estate, the rule being when one or more of several trustees act in getting in and dealing with the trust funds, an inactive trustee is accountable therefor equally with the others, if, having the means of knowledge by the exercise of ordinary vigilance, he stands by and permits a breach of trust to go on. *McCarter et al. v. McCarter et al.*, 7 O. R. 243.—Boyd.

By his will, P. S. C. empowered his executors, if required, to sell a parcel of his lands to pay off "debts or encumbrances" against his estate. The land was sold by the executors, all of whom in some degree acted in their executorial capacity or as trustees, but by tacit consent, one of them took the actual management of the estate and received the moneys arising from it, including



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purchase money, nor was there any evidence  
that she knew a balance remained in the hands  
of her co-trustee after satisfying the "debts or  
encumbrances," or that he was misapplying it:  
—Held, that under these circumstances, H. A.  
C. was not responsible to the estate for the mis-  
appropriation by her co-trustee:—Held, also,  
that even if she had been liable for the principal  
money so misappropriated, she would not have  
been for the interest, inasmuch as the principal  
never came into her hands. *McCarter v. Mc-*  
*Carter*, 7 O. R. 243; *Burrows v. Walls*, 5 DeG.  
M. & G. 233; *Podbard v. Cooke*, 25 W. R. 556,  
and *Cowell v. Gatcombe*, 27 Beav. 568, dis-  
tinguished. *Re Crowler—Crowler v. Hinman*,  
10 O. R. 159.—*Ferguson*.

#### 5. Powers of.

A., on his marriage, having conveyed a certain  
farm (which was then under contract of sale) to  
the trustee of his marriage settlement, provided  
that the purchase money, if the sale was carried  
out, and the land itself, if the sale was not car-  
ried out, was to be held subject to the trusts of the  
settlement, as follows: "And it is hereby agreed  
by and between the parties hereto, that on the  
payments of principal being made from time to  
time by the said J. J. V., (purchaser) the said S.  
B. E., (trustee) or any other trustee or trustees  
to be appointed as hereinafter mentioned, shall  
invest the same in such estate or securities,  
whether real or personal, and of what nature or  
kind soever as to him or them shall seem best,  
and most advantageous to the interest of the  
trust hereby created, and on such investments  
being from time to time realized the same to re-  
invest in like manner." The settlement also  
provided that if the said J. J. V. forfeited any  
right he had to the said real estate it should vest  
in the trustee for the purposes and uses of the said  
trusts therein before mentioned as regards the pur-  
chase money with full power to lease or sell the  
same, etc. The purchaser, J. J. V., having failed  
to carry out his purchase, and having relinquished  
any claim he had to the farm, the trustee sub-  
sequently exchanged the farm for a city lot. On  
an agreement for a sale of the city lot, the pur-  
chaser declined to carry out the purchase on the  
ground that the trustee had no power under the  
settlement to sell and convey. On an applica-  
tion by the trustee under the Vendors and Pur-  
chasers Act R. S. O. c. 109. It was:—Held,  
that there was a direction to invest in real estate,  
and following *Joint Stock Discount Co. v. Brown*,  
L. R. 3 Eq. 139, that "investing in" means the  
"actual purchase," and the purchaser's objections  
were overruled, with costs. *Re Barwick and Lot*  
*Three on the North Side on King Street in the City*  
*of Toronto on the Plan of the Jail and Court House*  
*Block*, 5 O. R. 710.—*Boyd*.

The trustees of M., deceased, who held the  
legal estate in land in trust for sale for the pur-  
pose of a reservoir, sold to one Z. in 1854, a  
portion of lot ten, Niagara Falls survey, for the  
purpose of a reservoir, the intention being to run  
a line of pipes over the residue of said lot to  
Niagara Falls, where a pump-house was to be  
constructed for the purpose of forcing the water

to the reservoir, and thence it was to be distri-  
buted by pipes over the town of Niagara Falls.  
T. B., as well as E. B. M., the acting trustee,  
agreed to extend this lease for ever at a rental  
to be fixed every twenty-one years. The trustees  
subsequently sold the land in question to S. B.,  
son of T. B., whose place, it was understood, S.  
B. was to take, T. B. having the right of pur-  
chase under his lease, and having expended large  
sums in improving the property. S. B. subse-  
quently mortgaged to a certain company, who  
sold under foreclosure proceedings to the plaintiff.  
The land through which such pipes were to run  
had been devised by one M. to E. B. M., his  
wife, and three others as trustees. In 1854 E.  
B. M. alone leased it to T. B. for fourteen years.  
In 1854 T. B. leased a strip eight feet wide by  
650 feet long to Z., for the purpose of laying his  
pipes therein, for ten years, at a nominal rent,  
and both T. B. and E. B. M., in that year, by  
separate instruments, covenanted with S. B. that  
she or T. B., if he should purchase the land  
under a provision in his lease for that purpose,  
would continue the lease to Z. for twenty-one  
years, perpetually renewable, at a rent to be  
fixed by arbitration. Z. constructed the reser-  
voir, &c., and laid down the pipes in 1854, and  
the town had been supplied by them ever since.  
In 1864 E. B. M. gave a further lease to T. B.  
for seven years, and in 1868 she conveyed to S.  
B., the appointee of T. B., his father. S. B.  
mortgaged to a loan company, who sold under a  
decree for sale to the plaintiff, stating in the ad-  
vertisement that it was subject to the right of  
the defendants, who represented Z., to lay their  
water-pipes under the lease from T. B. to Z.  
After the expiration of that lease no further lease  
had been executed, but \$12 a year was by agree-  
ment, paid as rent to T. B. and to S. B. until  
the title became vested in the plaintiff, who re-  
fused to accept rent or to recognize defendants'  
rights, and brought trespass against them:—  
Held, 1. That the lease of 1850 by E. B. M.  
alone was not binding on her co-trustees unless  
they could be shewn to have agreed to it; 2.  
That the right of Z. to get a lease from T. B.,  
under the covenant of 1854, continued as against  
T. B. under the second lease of 1864; 3. That  
the defendants having, under the covenants of  
T. B. and E. B. M., taken possession and con-  
structed the works, which were of a permanent  
and expensive character, and for the public ben-  
efit, and having paid rent up to the time of the  
plaintiffs acquiring title, and all parties having  
had notice, and made no objection, they were  
entitled to an injunction staying the action, and  
to a lease for twenty-one years, renewable at a  
rent to be fixed by arbitration or by the registrar  
of the court. *Davis v. Lewis et al.*, 8 O. R. 1—  
Q. B. D.

#### VI. CESTUI QUE TRUST.

##### 1. Right to Possession of Property.

The rule is that when property is devised to  
a trustee to pay the rents and profits to any per-  
son the cestui que trust is entitled to the posses-  
sion; but where other parties have also a claim,  
it rests in the discretion of the court whether the  
actual possession shall remain with the cestui  
que trust or the trustee. *Orford v. Orford*, 6  
O. R. 6.—*Chy. D.*

J. O. by his will provided as follows: "4. Notwithstanding the directions hereinbefore contained, I desire that if my son W. O. returns to Toronto within five years from the date of my death, my said executors shall hold in trust for him from the time of his return to Toronto said lots Nos. \* \* subject to the existing life estate of my said wife in a portion thereof, during the term of his natural life, and shall pay over to him all rents, issues and profits thereof, and after his death shall divide the same between his children in such manner as he shall in his last will and testament direct, and in default of such direction and appointment to divide said property equally between them, conveying to each child his or her share when, if a son, he attains the age of 21 years, or a daughter attains the age of 21 years or marries, and in the meantime to apply the proceeds of the same to the support and maintenance of said children." In an action by W. O. against the executors and trustees of the will, claiming the actual possession of the property of which he was entitled to the rents and profits, it was—Held, that he was not entitled to such possession, and his action was dismissed with costs. *Whiteside v. Miller*, 14 Chy. 393, commented on and followed. *Ib.*

## 2. Following Trust Money.

Where C., an insolvent, had assigned all his assets and stock in trade to S., as trustee for creditors, and the plaintiff claimed a specific lien on the same to the extent of certain trust moneys, which had come into C.'s hands, as trustee and executor for the plaintiff, under the will of his (the plaintiff's) father, but had been wrongfully converted by C. to his own use, and employed in his own business to pay his trading debts, but as to which there did not appear to be any identity or connection with the stock in trade assigned to S.:—Held, that the plaintiff as against S. was only entitled to a dividend with the other creditors, on the full amount, with interest down to the time of assignment. *Culhane v. Stuart et al.*, 6 O. R. 97.—Chy. D.

See *Bailey v. Jellett et al.*, 9 A. R. 187, p. 42; *Gibaldi v. La Banque Jacques Cartier*, 9 S. C. R. 597, p. 162.

## VII. MISCELLANEOUS CASES.

A foreigner was appointed trustee for infants under 47 Vict. c. 20, (Ont.), to receive insurance moneys, without being required to give security in this province, on its being shewn that he had given security upon his appointment as guardian, to the satisfaction of a court in the state where he and the infants resided. The insurance company were discharged upon payment to the trustee of the moneys in their hands. *Re Andrews*, 11 P. R. 199.—Ferguson.

A transfer of the estate does not involve the transfer of trusts or powers necessarily as inseparable incidents of the estate. *Re Gilchrist and Island*, 11 O. R. 537.—Boyd.

Clergy commutation trust. See *Wright v. Incorporated Synod of the Diocese of Huron*, 11 S. C. R. 95, p. 79.

See *Simpson v. Corbett*, 5 O. R. 377; 10 A. R. 32, p. 261; *Hughes v. Rees*, 5 O. R. 654, p. 350.

## ULTRA VIRES.

See CONSTITUTIONAL LAW.

## UNDUE INFLUENCE.

See FRAUD AND MISREPRESENTATION.

## USAGE.

See CUSTOM AND USAGE.

## USE AND OCCUPATION.

D., by permission of the commissioner of Crown lands for Ontario, built a wharf on the waters of Toronto Bay at the island near Hanlan's Point; and claimed a sum of money from C. for the use and occupation by him of the wharf in landing passengers from the steamer:—Held, that there could be no recovery; for the evidence failed to shew any agreement by C. to pay wharfage, &c., or that tolls had been usually collected or charged, while the relationship and dealing of the parties would raise the inference that no charge was contemplated. *Cleudin v. Turner*, 9 O. R. 34—C. P. D.

## USES (STATUTE OF).

certain owners of the equity of redemption in lands by deed granted the same to "A., his heirs and assigns, to have and to hold the same to A., his heirs and assigns, unto, and to the use of B., his heirs and assigns." This was dated 17th July, 1875, and registered July 21st, 1875:—Held, that whether this deed operated under the Statute of Uses or not, B. took under it the beneficial interest in fee, and it had the same effect as if it were a conveyance to A. upon trust for the benefit of B. *Imperial Bank of Canada v. Metcalfe*, 11 O. R. 467.—Ferguson.

## VACATION.

The term vacation in G. O. Chy. 642, means Christmas as well as long vacation. *Blake v. Building and Loan Association*, 10 P. R. 153.—Boyd.

## VAGRANT ACT.

See BAWDY HOUSE.

The Vagrant Act, 32 and 33 Vict. c. 28 (Dom.), declares certain persons or classes of persons to be vagrants, amongst others, "all common prostitutes or night walkers wandering in the fields, public streets, highways, lanes, or places of public meeting, or gathering of people, not giving a satisfactory account of themselves, all keepers of bawdy houses and houses of ill-fame, or houses for the resort of prostitutes, and persons in the habit of frequenting such houses, not giving a

ES.  
AL LAW.  
ENCE.  
PRESENTATION.

USAGE.

PATION.

Commissioner of Crown  
arf on the waters of  
ear Hanlan's Point;  
from C. for the use  
he wharf in landing  
:—Held, that there  
he evidence failed to  
o pay wharfage, &c.,  
usually collected or  
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e inference that no  
lending *v. Turner*,

TE OF).

ity of redemption in  
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Ferguson.

ON.

O. Chy. 642, means  
vacation. *Blake v.*  
ion, 10 P. R. 153.—

ACT.

OUSE.

3 Vict. c. 28 (Dom.),  
classes of persons to  
be, "all common pro-  
dering in the fields,  
es, or places of pub-  
people, not giving a  
selves, all keepers of  
ill-fame, or houses  
and persons in the  
houses, not giving a

satisfactory account of themselves;" and "shall  
upon conviction be guilty of a misdemeanor, and  
punishable," &c. :—Held, that the Act does not,  
on its true construction, declare that being a  
prostitute, &c., makes such persons liable to pun-  
ishment as such; but only those who when found  
at the places mentioned, under circumstances  
suggesting impropriety of purpose, on request or  
demand are unable to give a satisfactory account  
of themselves. *Regina v. Arscott*, 9 O. R. 541.—  
Rose. But see *Arscott v. Lilley et al.*, 11 O. R.  
153, p. 45.

The defendant registered his name and address  
at the American Hotel, Toronto, and on the same  
day was arrested at the Union Railway Station,  
having been pointed out to the police by some of  
the railways' officials as a suspicious character.  
On his person were found two cheques one for  
\$700 the other for \$900, which were sworn to be  
such as are used by "confidence men," a mileage  
ticket nearly used up in favour of another person,  
and \$8 in cash. He offered no explanation of the  
cheques or the ticket, and gave no information  
about himself :—Held, that the Vagrant Act did  
not warrant his arrest, much less his conviction.  
Before a person can be convicted of being a vag-  
rant of the first class named in the Act ("All idle  
persons who, not having visible means of main-  
taining themselves, live without employment")  
he must have acquired in some degree a character  
which brings him within it as an idle person, who  
having no visible means of maintaining himself,  
i. e., not "paying his way," or being apparently  
able to do so, yet lives without employment.  
*Regina v. Bassett*, 10 P. R. 386.—Osler.

The defendant was summarily convicted under  
32 & 33 Vict. c. 28, s. 1, (Dom.), as "a person who,  
having no peaceable profession or calling to main-  
tain himself by, but who does, for the most part,  
support himself by crime, and then was a vag-  
rant," &c. The evidence shewed that the de-  
fendant did not support himself by any peaceable  
profession or calling, and that he consorted with  
thieves and reputed thieves; but the witnesses  
did not positively say that he supported himself  
by crime :—Held, that it was not to be inferred  
that the defendant supported himself by crime;  
that to sustain the conviction there should have  
been statements that witnesses believed he got  
his living by thieving, or by aiding and acting  
with thieves, or by such other acts and means as  
shewed he was pursuing crime. *Regina v. Organ*,  
11 P. R. 497.—Wilson.

#### VENDOR'S AND PURCHASER'S ACT.

Semble, applications under the Vendor and  
Purchaser Act should not be made for the mere  
purpose of settling questions of title when the  
existence and validity of the contract is not dis-  
puted. *Re Bingham v. Wigglesworth*, 5 O. R.  
611.—Ferguson.

If under R. S. O. c. 109, the court adjudicates  
upon a question of title between vendor and pur-  
chaser, and directs the purchaser to carry out  
his contract, and the purchaser then fails to carry  
out the contract, it is unnecessary to bring an  
action for specific performance of the contract;  
the requisite relief may be had on notice of mo-  
tion for payment of the purchase money, or in

default a resale, &c. *Re Craig*, 10 P. R. 33.—  
Ferguson.

More evidence may be required as between a  
vendor and purchaser than in a suit where the  
owner or those claiming under him are parties.  
*Re Morton and lot No. 6 on Plan 580 in the County  
of York*, 7 O. R. 59.—Proudfoot.

See *Re Boustead and Warwick*, 12 O. R. 488,  
p. 623; *Van Velsor et al. v. Hughson*, 9 A. R. 390,  
p. 242.

#### VENDOR'S LIEN.

See SALE OF LAND.

#### VENUE.

See PLEADING.

#### VERDICT.

I. NEW TRIAL WHEN VERDICT IS AGAINST  
EVIDENCE OR THE WEIGHT OF EVIDENCE—See NEW TRIAL.

II. ESTOPPEL BY VERDICT OR JUDGMENT—See  
JUDGMENT.

In an action against the defendant, as a sur-  
geon, for negligence, the jury found for the plain-  
tiff, but added to their verdict the following :—  
"We are of opinion that the defendant made a  
mistake in not calling in skilful assistance, but  
not wilfully or through inattention :—Held, a  
mere expression of opinion, and that it did not  
nullify or affect the verdict. *Sheridan v. Pigeon*,  
10 O. R. 632.—Q. B. D.

See *Star Kidney Pad Co. et al. v. Greenwood*,  
5 O. R. 28, p. 685.

#### VESSEL.

See SHIP.

#### VOLUNTARY CONVEYANCE.

See FRAUDULENT CONVEYANCES.

A voluntary or covinous conveyance under 27  
Eliz., c. 4 is voidable only, and is good and valid  
until avoided. *Harper v. Culbert et al.*, 5 O. R.  
152.—Ferguson.

#### VOLUNTARY PAYMENT.

See PAYMENT.

#### VOTERS LIST.

See PARLIAMENTARY ELECTIONS.

## WAGES.

See MASTER AND SERVANT.

## WAIVER.

IN MATTERS OF PRACTICE—See PRACTICE.

Of mechanics lien. See *Makins v. Robinson*, 6 O. R. 1.

Where a party does not plead a prior judgment in bar by way of estoppel before the entry of a judgment directing a reference to the master, he waives it, and leaves the whole matter at large to be enquired into on the evidence. *Hughes v. Rees*, 10 P. R. 301.—*Hodgins, Master in Ordinary*. But see *S. C.*, 9 O. R. 198.

Held, in this case, that a clause in the answer of W. S. expressing his willingness that the will should be construed by the court and the rights of the parties thereunder determined had not the effect of waiving any right that might have accrued to him during the progress of the suit. *Archer v. Severn et al.* 12 O. R. 615.—*Proudfoot*.

Of right of tenant to redeem mortgage. See *Martin v. Miles*, 5 O. R. 404.

Election to waive personal liability on a note, and except liability of a company. *Brown v. Howland*, 9 O. R. 48.

Of notice to arbitrator of time and place for signing award. See *Norvell v. The Canada Southern R. W. Co.*, 9 A. R. 310.

Of priority of rights of the Crown by acceptance of dividends. See *Regina v. The Bank of Nova Scotia et al.*, 11 S. C. R. 1.

Of notice of abandonment of ship. See *Milville Mutual Marine and Fire Ins. Co. v. Driscoll et al.*, 11 S. C. R. 183.

Of objection to assessment. See *Ex parte Lewin*, 11 S. C. R. 484.

Of objections to title. See *Clarke v. Langley*, 10 P. R. 208.

Of purchaser to compensation from vendor for being kept out of possession, by taking a vesting order. See *Barber v. Barber*, 11 P. R. 137.

Of commission of waste. See *Holderness v. Lang*, 11 O. R. 1.

Of notice to quit. See *Laxton v. Rosenberg*, 11 O. R. 199.

Of condition in insurance policy. See *Smith v. The City of London Ins. Co.*, 11 O. R. 38.

When a defendant submits to examination before a magistrate it is too late afterwards to object to its propriety. *Regina v. Ramsay*, 11 O. R. 210.—*Galt*.

Notice of defect in machinery sold. See *Tomlinson v. Morris et al.*, 12 O. R. 311.

## WALL.

See BUILDINGS.

## WAREHOUSE RECEIPTS.

See BILLS OF LADING AND WAREHOUSE RECEIPTS.

## WAREHOUSEMEN.

See *Brodie v. The Northern R. W. Co.*, 6 O. R. 180, p. 587; *Milloy v. Kerr*, 8 S. C. R. 474, p. 54; *Vineberg v. Grand Trunk R. W. Co.*, 13 A. R. 93, p. 589.

## WARRANT.

I. FOR SALE OF LAND FOR TAXES—See ASSESSMENT AND TAXES.

II. OF COMMITMENT—See JUSTICES OF THE PEACE.

III. SEARCH WARRANT—See SEARCH WARRANT.

## WARRANTY.

See INSURANCE.

Plaintiff sued the defendants for the value of a portable engine and boiler which had been hired by the defendants, and which boiler had exploded when in their possession immediately after they had begun to use it, and while in charge of a competent engineer:—Held, that as the lessor of a chattel for hire impliedly warrants that it is reasonably fit for the purpose for which it is let, the plaintiff, in the absence of negligence on the part of the defendants, could not recover. *Reynolds v. Roxburgh et al.*, 10 O. R. 649.—*Q. B. D.*

The defendant was a manufacturer of steam threshing machines, which were recommended as being safe from fire; that the engine would not throw out sparks, and that the separator, which was sold and used therewith, would not throw out grain in the chaff, and that altogether these were the best threshing machines in the world. The plaintiff alleged that after hearing these recommendations he sent a written order to the defendant for a steam engine and separator, which when used proved defective, the engine throwing out sparks and the separator wasting the grain by throwing it out with the chaff; and he claimed to have the contract of purchase rescinded and the notes given by him in payment for the machine returned; and \$300 damages. The judge at the trial having ruled that the plaintiff could not rescind the contract, but could only recover, as damages for breach of warranty, the difference in value between the machine contracted for and the one which was delivered—the jury found (in answer to questions) that there was a warranty which had been broken and that by such breach the plaintiff had sustained damages to the amount of \$500. Per Cameron, C. J. C. P., the plaintiff's claim on the pleadings was for breach of a contract not proved by the evidence, and no amendment should be allowed to change it into an action for breach of warranty; but there should be a new trial. As to the question of damages. Per Hagarty, C. J. O., and Rose, J.; the damages claimed in the plead-

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l., 10 O. R. 649—Q.

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ings were claimed upon the basis of a rescission of the contract and return of the notes. The damages awarded were for a breach of warranty, the plaintiff keeping the machine and paying for it; and there was evidence to support the finding of the jury as to damages. Per Cameron, C. J. C. P. There was no evidence from which the plaintiff's damages for breach of warranty could be reasonably ascertained, and for this reason also there should be a new trial. The court being equally divided, the appeal was dismissed. *Ellis v. Abell*, 10 A. R. 226.

The defendant delivered a piano to the plaintiff on a "hire contract," the price being stated to be \$500, payable by crediting \$100 on an old piano taken in exchange, and the balance of \$400 by monthly instalments, the plaintiff giving a note for the \$400, payable by like instalments. The contract stated that the defendant did "neither part with said piano," nor did the plaintiff "acquire any title" to it until the note was fully paid. Certain instalments fell due and payment was enforced, and there were instalments in arrear when action was brought. The plaintiff sued for fraudulent misrepresentations, and for general damages for breach of implied warranties; the alleged misrepresentations or warranties being that the piano was worth \$500; that it was a first class instrument; and as good as any Steinway or Chickering piano. The jury found for the plaintiff with damages:—Held, that as the property had not passed, an action for the breach of warranty would not lie. *Frye v. Milligan*, 10 O. R. 509.—C. P. D.

By a written agreement the defendants sold a threshing machine for \$500 to the plaintiff, taking an engine in part payment of \$250, the balance to be secured by promissory notes. The right of possession was to be in plaintiff until default, but until payment the right of property was to be in defendants; with a warranty by defendants that with good management the machine would do good work and was superior to any other machine made in Canada, &c.; and if upon starting the machine, the plaintiff, following the printed hints, rules, and directions of defendants, was unable to operate it well, he was to give defendants written notice of the defect, and a reasonable time was to be allowed defendants to get to the machine and remedy the defect, unless they could advise by letter; but if they were unable to make it operate well, &c., and the fault was in the machine, they were to take it back and refund the payments made, or remedy the defective part, but if the fault was through improper management or neglect to observe the printed, &c., directions, the plaintiff was to pay all necessary expenses incurred; and if, plaintiff observing such directions, any part, except belting, failed during the year, through any defect in material, the defendants, on presentation at the manufactory of the defective piece, were to furnish a duplicate thereof, but defects in pieces were not to condemn other parts. Deficiencies in general adaptation for threshing, separating, &c., for which alone the machine should be taken back, must be reported ten days after starting the machine, and not after continued use or injury thereto. The defendants lived, on the plaintiff's complaint, attended and made alterations in the machine, whereupon the plaintiff used the machine for six weeks, and then sent it back to the defendants, because, as the

plaintiff said, it failed to comply with the warranty, and he had no further use for it; but, as defendants understood, to be repaired. The plaintiff did not ask for the return of the engine. No printed hints, &c., were given by defendants, nor written notice of the defect given by plaintiff; and no default was made by plaintiff in payment of the instalments. In an action to recover the \$250, the value of the engine taken as part payment, the re-delivery of the notes, and \$500 damages for breach of warranty:—Held, following *Frye v. Milligan*, 10 O. R. 509, that as the property in the machine had not passed to the plaintiff, he could not maintain an action for breach of warranty. Held, also, that the plaintiff was not entitled to return the machine after the expiration of the ten days, no notice in writing of the defect complained of having been given; and that the fact of the defendants' previous attendance to make alterations did not constitute a waiver of their right to such notice, as the evidence shewed that when plaintiff sent for defendants he did not intend giving notice with a view of availing himself of the right to rescind; and the starting under the contract must be regarded as that which took place after the machine was so altered. *Tomlinson v. Morris et al.*, 12 O. R. 311.—C. P. D.

See *Borthwick v. Young*, 12 A. R. 671, p. 613;  
*Dymont v. Thomson*, 12 A. R. 659, p. 670.

## WASTE.

Alterations in building by tenant. See *Hol-  
derness v. Lang*, 11 O. R. 1.

Right of tenant for life to cut timber. See  
*Saunders v. Breckie*, 5 O. R. 603; *Munsie v.  
Lindsay*, 10 P. R. 173.

See *White v. Nelles*, 11 S. C. R. 587, p. 402;  
*Mill v. Mill*, 8 O. R. 370, p. 323.

## WATER AND WATER COURSES.

### I. NAVIGABLE WATERS, 702.

### II. FORMING BOUNDARIES, 703.

### III. RIGHTS OF RIPARIAN PROPRIETORS, 704.

### IV. RIGHTS BY PRESCRIPTION, 707.

### V. PENNING BACK WATER, 707.

### VI. POLLUTION OF WATER, 708.

### VII. FLOATING TIMBER, 708.

### VIII. LIABILITY OF MUNICIPALITIES FOR IN- JURIES CAUSED BY STREAMS, DRAINS, OR SEWERS, 709.

### IX. DRAINAGE BY LAWS—See MUNICIPAL COR- PORATIONS.

### I. NAVIGABLE WATERS.

Held, in this case, that the wharf being constructed over the navigable waters of the bay, the license of the Commissioner of Crown Lands for the Province of Ontario, even if he had power to grant it, would not confer the right to impose tolls on vessels landing passengers on the

wharf, for the public had a right to reach the shore over the waters of the bay, and C. having been invited, as it appeared, by the proprietors of Hanlan's point to run his vessel there he had a right to land on the wharf which prevented his reaching the island at that place:—Quare, whether the soil at the bottom of the Toronto Bay at the place in question was vested in the province, or in the city of Toronto under the patent from the Crown of the island. *Clendenning v. Turner*, 9 O. R. 34.—C. P. D.

E. et al. brought an action of tort against W. for having pulled up piles in the harbour of Halifax below low water mark, driven in by them as supports to an extension of their wharf, built on certain land covered with water in said harbour of Halifax, of which they had obtained a grant from the Provincial Government of Nova Scotia in August 1861. W. pleaded, inter alia, that "he was possessed of a wharf and premises in said harbour, in virtue of which he and his predecessors in title had enjoyed for twenty years and upwards before the action, and had now, the right of having free and uninterrupted access from and to Halifax harbour to and from the south side of said wharf, with steamers, &c., and because certain piles and timbers, placed by the plaintiffs in said waters, interfered with his rights, he (defendant) removed the same." At the trial there was evidence that the erections which E. et al. were making for the extension of their wharf did obstruct access by steamers and other vessels to W.'s wharf. A verdict was rendered against W., which the full court refused to set aside. On appeal to the Supreme Court of Canada it was:—Held, (reversing the judgment of the Supreme Court of Nova Scotia) that, as the Crown could not, without legislative sanction, grant to E. et al., the right to place in said harbour below low water mark any obstruction or impediment so as to prevent the free and full enjoyment of the right of navigation, and as W. had shewn special injury, he was justified in removing the piles which were the trespass complained of. *Wood v. Eason*, 9 S. C. R. 239.

Professing to act under the powers contained in their Act of incorporation, 45 Vict. c. 100 (N. B.), the Q. R. B. Co. erected booms and piers in the Quaddy River which impeded navigation—the locus being in that part of the river which is tidal and navigable:—Held, affirming the judgment of the court below, that the Provincial Legislature might incorporate a boom company, but could not give it power to obstruct a tidal navigable river, and therefore the Act 45 Vict. c. 100 (N. B.), so far as it authorizes the acts done by the company in erecting booms and other works in the Quaddy river obstructing its navigation, was ultra vires of the New Brunswick Legislature. *The Quaddy River Drilling Boom Co. et al. v. Davidson*, 10 S. C. R. 222.

See *Gardiner v. Chapman*, 6 O. R. 272, p. 704; *Warin et al. v. The London and Canadian Loan and Agency Co.*, 7 O. R. 706, p. 705; *Ratte v. Booth*, 11 O. R. 491, p. 706.

## II. FORMING BOUNDARIES.

Where a river flowed diagonally through a certain lot of land, and the owner of the lot granted the part thereof lying N. or E. of the

said river to one party, and the part lying S. or W. of the said river to the other party:—Held, that this would carry the ownership of the soil to the mid thread of the river to the respective parties, no evidence of intention inconsistent therewith appearing upon the instrument. *Re Trent Valley Canal and Land Expropriated at Fenelon Falls*, 12 O. R. 154.—Boyd.

See *Attrill v. Platt*, 10 S. C. R. 425, *infra*; *Ratte v. Booth*, 11 O. R. 491, p. 706.

## III. RIGHTS OF RIPARIAN PROPRIETORS.

C. the owner of two lots of land divided in one place by G.'s land, and in another by a bay formed by the waters of the Rideau Canal, which washed the shores of all these lots, began to construct a bridge between his two lots for easier access between them, which bridge would have the effect of cutting off G.'s land from the canal, and of making the water between the bridge and G.'s land stagnant. In an action by G. against C. for an injunction to compel him to desist from the work, and remove that part already constructed. It was:—Held, that G. had the rights of an ordinary riparian owner, and that the stream being a navigable one made no difference, except that those rights are subject to the public right of navigation, that those rights had been injuriously affected by the defendant, that the plaintiff shewed that an injury would result to him if the work was completed, and that he might in good time bring his action to prevent the wrong, that even if the bay was not part of the Rideau Canal itself, so as to give him the rights of an owner and occupant of lands adjoining the canal under 8 Geo. IV. c. 1, s. 15, he was entitled to use it as a means of access to the canal, and that on the evidence the plaintiff was entitled to his injunction. *Gardiner v. Chapman*, 6 O. R. 272.—Ferguson.

Besides the lands the title to which was derived from their common grantor, the appellant was proprietor of another piece of land, called block A., situated on the opposite side of the River Maitland, the boundary of said block on the river side being high water-mark:—Held, that the lateral or riparian contact of the land with the water would suffice to entitle the appellant to object to any unauthorized interference with the flow of the river in its natural state. *Attrill v. Platt*, 10 S. C. R. 425.

A. was lessee for years of the west half, which was practically vacant, of water lot 17, Toronto harbour, B. proprietor of the east half of the same lot, on which, erected more than twenty years before action, were a wharf and storehouse, so near the dividing line of the half lots that vessels could not call at the west side of the wharf, where all the business was done, without passing over the half lot of A. and partially occupying the same while lying at the wharf. B. and his successors had also laid up vessels at their wharf in winter, two or three abreast, occupying part of A.'s half lot nearly every year since the erection of the wharf, and about eighteen years before action built on the wharf an elevator for receiving and shipping grain at the west side of the wharf. In 1883 A. put up a notice warning persons against trespassing on his half lot, which vessels passing to B.'s lot knocked down. Sub-



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C. R. 425, *infra*;  
p. 706.

#### N PROPRIETORS.

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*Gardiner v. Chapman*,

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sequently, in the same year, A. drove piles into  
the soil of his own half lot, ostensibly as a  
foundation for boat houses, and was about to  
drive others, to the obstruction of the approach  
to B.'s wharf, when B., to meet this, began  
moving vessels to and from his wharf, and finally  
moving them to his wharf and extending into  
the waters on A.'s lot, thus preventing him from  
driving more piles. In trespass by the plaintiff,  
B. claimed, first, an easement by prescription  
and non-existing grant to the owners of the fee—  
whose lessee, Taylor, who erected said wharf,  
was—over A.'s lot to the extent necessary to  
allow vessels to pass to and from his wharf, and  
to lie up there; secondly, that the waters cover-  
ing said water lot were navigable waters, part of  
Lake Ontario and Toronto harbour, and that the  
wharf was a construction within the law for the  
purposes of enabling the harbour to be used, and  
the safe and useful navigation of said waters,  
and that the act of A. was a wrongful interfer-  
ence and an obstruction of the use of the said navi-  
gable waters, which B. was entitled to abate:—  
Held, 1. That the waters covering said lot seven-  
teen were part of the navigable waters of Lake  
Ontario, and the same law was applicable thereto  
as in the case of tidal waters, in the absence of a  
valid grant the soil being vested in the Crown  
and subject to the jus publicum of navigation;  
2. That the 23 Vict. c. 2, s. 35, (R. S. O. c. 23,  
s. 47,) gives to the Crown authority to grant  
water lots, and the grant of water lot seventeen  
by the description, "land covered with water,"  
was valid under these enactments, and sufficient  
to pass to the grantee and his representatives  
the soil and the jus publicum for navigation and  
the like in the water, which could be built upon,  
filled up, or otherwise dealt with, as might be  
thought proper; 3. That so long as A.'s water  
was unenclosed or unoccupied any one might  
pass over or across it without being liable to be  
treated as a trespasser, and an easement such as  
that claimed cannot therefore be acquired; 4.  
That the claim to an easement was not founded  
on an enjoyment nec clam, nec vi, nec precario,  
and was therefore not as of right, and could not  
be sustained; 5. That the evidence shewed the  
user of the plaintiffs' water lot was not as of  
right, and the finding of the jury was warranted  
by the evidence; 6. That neither the erection of  
the wharf nor its long use, nor the erection of  
the elevator, shewed such a claim of enjoyment  
as of right as to satisfy the statute; 7. That in  
any event the claim was of an easement in  
gross, and therefore invalid; 8. That the ver-  
dict upon the evidence set out in the report,  
should have been against the defendants in any  
event, because they were not making use of the  
waters for the purposes of trade and commerce  
when they anchored the vessels upon the lot; 9.  
That the patent to the city of Toronto of the  
water lots, confirmed by the esplanade legisla-  
tion, gave to the owners of water lots the right  
to fill in their lots, and turn them into land.  
*Marin et al. v. The London and Canadian Loan  
and Agency Co. et al.*, 7 O. R. 706—Q. B. D.  
Affirmed on appeal, 12 A. R. 327.

J. A. was the patentee of a certain water lot  
on the River Ottawa, and the description in the  
patent covered the lot and two chains distant  
from the shore, but a reservation was contained  
therein "of the free uses, passage and enjoyment  
of, in, over, and upon all navigable waters that

shall or may be hereafter found in or under, or  
be flowing through, or upon any part of the said  
parcel of land hereby granted." The said water  
lot was subsequently conveyed to A. R., but the  
description in the deed to him only went to the  
water's edge. The plaintiff also set up that he  
had a right by prescription to keep and use a boat  
house in front of his lot without being interfered  
with:—Held, reversing the judgment of Proud-  
foot, J., 10 O. R. 351, per Boyd, C.—The effect of  
the patent is to convey the dry land and the land  
covered by water two chains out, subject to the  
rights of the public in the Ottawa as a navigable  
river. As to the land bordering on the water  
the plaintiff is a riparian proprietor, and has the  
right to have the water in front of him open for  
all navigable purposes, and to enjoy it free from  
extraordinary impurities. Even if the land under  
the water is vested in the plaintiff's grantor he  
could not derogate from his grant to the water's  
edge by polluting, filling up, or otherwise cutting  
off his grantee from the beneficial enjoyment of  
the river, still less can the defendants be pro-  
tected in their wrong-doing. The grant to the  
patentee of the river-bed two chains out, carries,  
as parcel of it, the water thereon so that the bed,  
the bank, and the water are vested as private  
property in the patentee, subject to the servit-  
tude of a common public right of way for the  
purposes of navigation. The term "navigable  
waters" in the patent is to be construed as re-  
ferring to water of such a depth and situation as  
is, according to the reasonable course of naviga-  
tion in the particular locality, practically navi-  
gable. The patentee may rightfully use and  
occupy the land covered by water, but only so  
much as will not interfere with the public ease-  
ment; but every encroachment on the water  
will be at his peril if it is proved that he is guilty  
of a public nuisance. There was no evidence to  
show that the plaintiff's structure (boat-house) is  
a nuisance; and whatever may be the nature of  
the plaintiff's title or occupancy of the water, it  
is enough that his possession and business are, as  
against the public, legitimate in order to entitle  
him to recover as against a wrong-doer. Even  
if the plaintiff's place of business was proved to  
be a nuisance because it invaded the navigable  
waters of the river, it does not follow that that  
disposes of the plaintiff's claim for an injunction  
and damages, as he might well invoke the maxim,  
*Injuria non excusat injuriam*. Per Ferguson,  
J.—There is nothing either on the face of the  
conveyance to the plaintiff, or in the surround-  
ing circumstances at the time of its execution, to  
indicate that the grantor intended, if intention  
could now be of any consequence, to reserve to  
himself the part of the lot under the water, or  
any right or title to it. The contrary would  
rather appear, from his being in possession at  
the time, and having a boat-house situated as the  
present one is. By the conveyance to the plain-  
tiff he obtained title to the lands in the stream  
embraced in the two chains from the bank, but  
subject to the right of navigation expressed in  
the patent. What the plaintiff has done is no  
nuisance, nor is it shewn that he has caused any  
injury to navigation, and he is entitled to redress  
for the grievances of which he complains. Even  
if the plaintiff is not the owner of the land under  
the water, he is entitled to redress for the in-  
juries he has sustained as a riparian proprietor,  
merely. *Rutte v. Booth*, 11 O. R. 491—Chy.  
D.

See *Gray v. The Corporation of the Town of Dundas*, 11 O. R. 317, p. 711; *Wood v. Eason*, 9 S. C. R. 239, p. 703.

#### IV. RIGHTS BY PRESCRIPTION.

*Semble*, per *Proudfoot, J.*, that the right to fowl the stream could not be acquired by the defendants by a user of twenty years. *Van Eymond v. The Corporation of the Town of Seaforth*, 6 O. R. 599.

Held, that any structure on the water even if existing for twenty years, would be an interference with the free use of the river reserved by the Crown and the right to so interfere, could not be acquired by lapse of time. The action was therefore dismissed. *Warin v. The London and Canadian Loan and Agency Co.*, 7 O. R. 706, distinguished. *Rattle v. Booth, et al.*, 10 O. R. 351.—*Proudfoot*. But see *S. C.*, 11 O. R. 491.

See *Warin v. The London and Canadian Loan and Agency Co.*, 7 O. R. 706, p. 705; *Wood v. Eason*, 9 S. C. R. 239, p. 703; *Malcolm et al. v. Hunter*, 6 O. R. 102, *infra*.

#### V. PENNING BACK WATER.

When one brought action to restrain the diversion of the water which supplied his mill, from the channel in which it had flowed for more than twenty years, and it appeared that the channel was an artificial cut, diverting the water from its natural outlet, and had been made originally at the instance, and by permission of the then owner of the creek, in which the water naturally flowed, partly for the benefit of the owner, who had however, on many occasions blocked up the cut, so as to turn the water to its natural outlet:—Held, that such an occupation would not give a statutory right to the licensee, and that the onus was on the plaintiff to make out his right, and shew that there had been a change in the mode of user, after the origination by permission. *Malcolm et al. v. Hunter*, 6 O. R. 102.—*Boyd*.

The defendants were incorporated by 31 Vict. c. 66, (Ont.), with power to take and appropriate a slip of land 200 feet wide, and to construct and maintain a canal from Black river to Lake St. John, and thence to Lake Couchiching, with the full use and enjoyment of the waters of said river, and the tributary streams and Lake St. John for floating or moving logs; and to execute thereon all necessary works, but so as not to impair and injuriously affect the enjoyment of the present channels thereof; and to construct and keep in repair, subject to such provision, all locks, bridges, and erections necessary for said works; the price or the compensation for the lands taken in case of dispute, or for any lands flooded or injuriously affected by the company's works, to be settled by arbitration. The defendants under their statutory powers erected a canal, and at the point of commencement constructed two piers extending into the river; and in the St. John's creek, which flowed from Lake St. John to Black river below the canal, a dam was erected. A break occurred in the bank of Black river on the canal side beyond the piers,

whereby large quantities of water from Black river flowed into the canal, and thus into Lake St. John. Owing to the formation of Black river below the junction of St. John creek therewith, the water in the creek at high water during freshets was backed up into Lake St. John and overflowed the plaintiff's and other lands at the head of the lake. The plaintiff contended that either by the break in the river bank whereby more water was brought down than usual, or by the dam preventing the water from flowing away, it remained longer than it otherwise would have done, and thus caused the damage complained of. Special questions were not submitted to the jury, and there was no finding by them as to whether the cause of damage, if any, was the dam or the break in the river bank. The jury found for the plaintiff:—Held, therefore, there must be a new trial to ascertain whether the damage, if any, was caused by such dam or by the break in the river bank; and, if by the latter, was it the result of negligence or by vis major?—*Quære*, whether there was any liability cognizable in a court of law attachable on the defendants; and whether the compensation clause applied, the plaintiff's land not having been flooded under any right so to do claimed by the company. *Clarke v. The Rama Timber Transport Company (Limited)*, 9 O. R. 68.—*C. P. D.*

See *Attrill v. Platt*, 10 S. C. R. 425, p. 704.

#### VI. POLLUTION OF WATER.

See *Van Eymond v. The Corporation of the Town of Seaforth*, 6 O. R. 599, p. 710; *Gray v. The Corporation of the Town of Dundas*, 11 O. R. 317, p. 711; *Rattle v. Booth et al.*, 11 O. R. 491, p. 706.

#### VII. FLOATING TIMBER.

The plaintiff had erected dams, slides, and other improvements for facilitating the passage of saw logs and timber down a stream, floatable in a state of nature. Some of these slides were situated in the bed of the stream, others were built entirely on the plaintiff's land on one side of the stream, the water of which was dammed back so as to flow in part through the artificial channel thus constructed. The defendants, in driving their logs and timber down the stream, used all the slides and improvements. In an action for tolls for such user:—Held, following *Caldwell v. McLaren*, 9 App. Cas. 352, that as to all slides and improvements constructed in the bed of the stream plaintiff could not recover; but—Held, also, as to all such improvements outside the channel, and upon plaintiff's land, that a recovery by the plaintiff was proper. Held, also, that the absence of aprons of the proper statutable dimensions upon plaintiff's dams across the river afforded defendants no ground for claiming the right to use without compensation plaintiff's improvements not in the bed of the stream. *Boale v. Dickson*, 13 C. P. 337, remarked upon. *Mackey v. Sherman et al.*, 8 O. R. 28.—*Q. B. D.* See 47 Vic. c. 17.

See *The Queddy River Driving Boom Co. et al. v. Davidson*, 10 S. C. R. 222, p. 703.

water from Black  
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formation of Black  
St. John creek there-  
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and other lands at  
plaintiff contended  
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longer than it other-  
thus caused the dam-  
ages. Questions were not  
raised as to whether  
there was no finding  
of cause of damage, if  
the bank in the river bank.  
The plaintiff:—Held, there-  
fore trial to ascertain  
whether it was caused by such  
the river bank; and, if  
result of negligence or  
whether there was any  
of tort law attachable  
whether the compen-  
sation plaintiff's land not  
for any right so to do  
the *Clarke v. The Ramo-  
n (Limited)*, 9 O. R.

S. C. R. 425, p. 704.

OF WATER.

*The Corporation of the*  
599, p. 710; *Gray v.*  
*Town of Dundas*, 11 O.  
*Booth et al.*, 11 O. R.

## ING TIMBER.

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In an action for tolls following Caldwell v. B. D., that as to all slides constructed in the bed of the river, recovery; but—Held, no recoveries outside the plaintiff's land, that a recovery was granted. —  
r. Held, also, that the proper statutable dimensions across the river afforded claiming the right to test the plaintiff's improvements.  
*Boale v. Dickinson*.  
pon. Mackey v. Shepley.  
D. B. D. See 47 Vic.

*Driving Boom Co. et al.*  
222, p. 703.

### VIII. LIABILITY OF MUNICIPALITIES FOR INJURIES CAUSED BY STREAMS, DRAINS, OR SEWERS.

After a block pavement had been laid down on Queen street, one of the most travelled streets in the city of Toronto, a drain about two and a half feet wide was opened out across the street to the street railway track, and then tunnelled under the track. It was filled in with loose earth not rammed down. On Sunday it rained in consequence of which the earth was washed down and sunk, leaving a very dangerous hole. On Tuesday or Wednesday some residents in the neighbourhood, seeing its dangerous condition, took some cedar posts and placed them lengthwise in the hole. On Thursday night, about nine o'clock, it being very dark and no light at the drain, and the street lamps not being sufficient to shew it, the plaintiff, his wife, and another person, were driving along the road, and on reaching the drain the horse stumbled and fell, whereby the plaintiffs were pitched out of the wagon and injured. The jury found that the accident was caused by the wheels of the wagon coming in contact with the drain. The defendants contended that it was caused by the wagon coming in contact with the posts, and as they had not put them there they were not liable. It was agreed on the argument in the Divisional Court, that the court might draw inferences of fact as a jury, and give such judgment as in its view the evidence might warrant:—Held, that on the evidence the defendants must be deemed to have had notice of the condition in which the drain was at the time of the accident; and therefore it was immaterial whether the accident was caused by the drain or posts:—Semble, that as the manner in which the drain was filled in made it certain that in the event of rain the earth would sink, the defendants must be assumed to know that some one to protect the public would place posts or other covering over the hole, and were liable for any injury resulting. *Duck et al. v. The Corporation of the City of Toronto*, 5 O. R. 295.—C. P. D.

Many years before the defendant municipality was laid out, a culvert was constructed by Z. on private property for the benefit of a railway company whose lands adjoined the stream in question. By reason of the culvert, the water brought down by the stream was not carried off, but overflowed the plaintiff's land. The stream was the natural drain for the surrounding country, but the defendants used it to a small extent for the drainage of the town. It was found that the flooding would not have been occasioned by the water brought down through the defendants' user of the stream, but that water brought down from the area drained, apart from the defendants' user, would have alone caused the damage :— Held, that the defendants were not liable. *Lowe v. The Corporation of the Town of Niagara Falls*; *Bamfield v. The Corporation of the Town of Niagara Falls*. 6 O. R. 467.—C. P. D.

The defendants constructed a number of drains in their town, discharging into a creek running through the lands of the plaintiff, which drains conducted a quantity of brine or salt and refuse from salt manufactories in the neighbourhood into the creek, and rendered the water filthy and unfit for drinking, and also corroded the machinery in the plaintiff's woollen factory. And

the defendants, having passed a by-law to deepen the said creek, threw down the plaintiff's fences, entered upon his land, and threw up earth from the bed of the creek and left it there:—Held, affirming the decision of Proudfoot, J., that the drains not being constructed under a by-law, the plaintiff was entitled to maintain an action for his injury sustained, and for an injunction, and was not compelled to sue those who had discharged the offensive matter into the drains, nor to seek his remedy under the arbitration clauses of the Municipal Act, nor to resort to mandamus to compel better drainage:—Held, also, that damages for the trespass on the plaintiff's land could be recovered by action, as the corporate powers under the by-law for deepening the creek might have been exercised without the commission of the trespass; and this, too, notwithstanding that the work was done under and by means of a contractor, who, however, was not an independent contractor, but worked under the independence of the council. *Var Esmond v. The Corporation of the Town of Seaforth*, 6 O. R. 599. --Chy. D.

A drain was constructed by a municipal corporation, and by reason, as was alleged, of the negligent construction thereof it was not of sufficient capacity to carry away the water brought down it as was intended, or by reason of an obstruction negligently allowed to remain therein, the water overflowed the banks of the drain and damaged the plaintiff's premises:—Held, that the plaintiff's claim for the damage sustained was not one for compensation under the arbitration clauses of the Municipal Act; but was properly the subject of an action in which the findings of the jury should be had as to whether the damage was caused by such negligent construction, &c., or by vis major, namely, an unusual flood. *McArthur v. The Corporation of the Town of Collingwood*, 9 O. R. 368.—C. P. D.

When M. brought action for an injunction against a municipal corporation for that by reason of certain drainage works constructed by them the defendants had caused an increased quantity of water to flow into a creek running through his lands which were situate in an adjoining township, and which had consequently been flooded and damaged, partly from the access of water sent into the creek, and partly from the increased velocity imparted to the flow of water into the creek :—Held, that M. was entitled to an injunction restraining the increased flow of water into the creek, and also the increased velocity, and to a reference as to damages, and that he was not bound to proceed by way of arbitration under 46 Vict. c. 18, (Ont.) ss. 590, 591, but was at liberty to seek relief in the ordinary way by action :—Held, also, that the fact that the by-law under which the said drainage work was done had not been quashed, did not prevent the plaintiff from bringing this action. *Malot v. The Corporation of the Township of Mersea*, 9 C. R. 611—Chy. D.

The plaintiff's house was drained by a private drain into the street drain, which was near to but did not extend as far as his house. L., who also had a house drain connected with the street drain, put a grating across it near the connection with the private drain, which obstructed the street drain, and dammed back the water and sewage through plaintiff's private drain into his cellar and dam-

aged the plaintiff's premises. The nature of the obstruction was known to the plaintiff but not to the defendants, and the plaintiff did not notify them thereof. There was no by-law compelling property-owners to drain their premises into the street drain, and their use of it was entirely voluntary. There was no complaint as to the insufficiency or construction of the street drain. In an action by the plaintiff against the defendants for the injury sustained by him:—Held, that the defendants were not liable. *McConkey et al. v. The Corporation of the Town of Brockville*, 11 O. R. 322.—C. P. D.

A drain of the defendants for carrying off the surface waters of a street ran along the street and across it, and then through private property until it reached a creek. On the street there was a screw factory, the proprietors of which, by defendants' permission, connected a drain from their works with the defendants' drain, which had the effect of carrying noxious matter from the factory into the creek; but, on complaint thereat, the proprietors used an old cellar as a reservoir for the noxious matter; but which, it was alleged, filtered through from the cellar into the drain and so into the creek. The drain, without the infiltration into it from the cellar, from which it was twenty-six feet distant, conveyed nothing injurious into the creek. The plaintiff, a riparian proprietor on the creek, having a factory there, claimed that by reason of such fouling he was prevented from using the water of the creek for domestic purposes or for his factory, and brought this action against the defendants therefor:—Held, that defendants were not liable; but that the liability, if any, was on the screw factory. *Van Egmond v. Corporation of Seaford*, 6 O. R. 599, distinguished. *Gray v. The Corporation of the Town of Dundas*, 11 O. R. 317.—C. P. D. Affirmed by the Court of Appeal, 13 A. R. 588.

The approaches to a bridge built over a river were supported on trestle work, the water flowing through the trestle work and spreading over the low land until it fell into the river. The municipality subsequently filled in the trestle work and made a solid embankment there where-by the water was penned back, and sent down in a greater body and with greater force in the regular channel, by reason whereof a great part of the bank of the river upon which the plaintiff's factory was erected, was washed away and was being so washed away from year to year:—Held, that as the work was done by defendants in such a way as to occasion damage to the plaintiff, whereas it could and should have been done without such effect, this was a matter in which the plaintiff must prosecute his rights by action, and was not the subject of compensation under the arbitration clauses of the Municipal Act. The land in respect of which the claim was made was mortgaged:—Held, that the mortgagee was not a necessary party, the proceeding not being for compensation for land taken, but as a defence of and protection to property. As, however, his security might be prejudiced or diminished by the washing away of the land, and he might be able to assert some right to the compensation, there could be no objection to his being joined; but as the compensation was only some \$50, the Court would not require him to be made a party. *In Re Nickle and the Corporation of the Town of Walkerton*, 11 O. R. 433.—Wilson.

A drain constructed by a municipality wholly within the limits thereof, having fallen into disrepair, the plaintiff, whose lands were injured thereby, notified the council, calling upon them to repair, which they omitted to do:—Held, affirming the judgment of the Q. B. D. (2 O. R. 287), that the plaintiff was entitled to damages in respect of his lands so injuriously affected, the result of such neglect to repair; that the case came under s. 542, R. S. O. c. 174; and that if it did not he would be entitled to recover under section 543, for the neglect of the statutory duty to repair as directed thereby. *White v. The Corporation of the Township of Gosfield*, 10 A. R. 555.

In pursuance of the powers conferred by ss. 551 and 553 of the Municipal Institutions Act, R. S. O. c. 174, the council of the defendant municipality passed a by-law authorizing the paving of F. street with cedar blocks, which work was proceeded with, but executed in such a manner as to cause water to flow over and rest upon the lands of the plaintiff:—Held, affirming the judgment of Proudfoot, J., who found that the work had been negligently performed, that the plaintiff was entitled to recover the amount of damages sustained by her, and to enjoin the defendants from further overflowing her land; and that in consequence of such negligence her proper remedy was by action, not by a proceeding under the statute for compensation. *McGarry v. The Corporation of the Town of Strathroy*, 16 A. R. 631.

Reference under the Municipal Act. See *In re Hodgson and the Corporation of the Township of Bosanquet*, 11 O. R. 589, p. 466; *In re Smith and the Corporation of the Township of Plympton*, 12 O. R. 20, p. 466.

## WAY.

### I. CREATION OF.

1. *Laying out Public Roads by Private Persons*, 712.
2. *Private Way*, 713.

### II. HIGHWAYS, VESTED IN CROWN, 713.

### III. POWERS, DUTIES, AND LIABILITIES OF MUNICIPAL CORPORATIONS.

1. *Acquiring Roads*, 714.
2. *Opening Roads*, 715.
3. *Closing Roads*, 716.
4. *Repairing Roads*, 717.
5. *Liability for Damages in Constructing Roads*, 718.
6. *Liability for Injuries on Roads*, 719.

### IV. ROAD COMPANIES, 721.

### V. TOLLS, 721.

### VI. OBSTRUCTION OF ROADS, 722.

### VII. MISCELLANEOUS CASES, 722.

### I. CREATION OF.

1. *Laying out Public Roads by Private Persons*

See *Bliss v. Boeckh et al.*, 8 O. R. 451, p. 470; *Carey v. The City of Toronto*, 11 A. R. 416, p. 622.

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## 2. Private Way.

S. by his will devised his farm to trustees, who divided up the property into six several parcels, designated parcel 1, parcel 2, &c., according to a plan which was registered, and by contemporaneous conveyance under the Short Form Act, conveyed the parcels to the testator's six surviving children. The description of parcel 2, included the lane in question, described as a right of way, the use of which was thereby reserved to the owners of parcels 4 and 6, to which it was a way of necessity. Parcel 3, which adjoined the way, was conveyed without any mention of the lane. During the unity of title some farm buildings stood upon parcel 3, adjacent to the lane in question, which was used as a means of ingress and egress thereto, but they had long since disappeared. By the Short Form Act, R. S. O. c. 102, s. 4, every deed, unless an exception be made therein, shall be held to include all ways, easements, and appurtenances whatever to the lands therein comprised, belonging or in any wise appertaining or with the same, held, used, occupied, and enjoyed:—Held, that the defendant claiming under the grantee of parcel 3, could not claim a right of way over the lane: that s. 4 of the Short Form Act could not, under the circumstances, be deemed to apply: that the right of way was not a continuous easement, or way of necessity; and that plaintiff's right thereto was not barred by the Statute of Limitations:—Held, also, that the defendant as owner of a part of parcel 4, could not claim the right to use the way as appurtenant to parcel 3. *Maugham v. Casci*, 5 O. R. 518—C. P. D.

In an action of trespass q. c. f. the defendants justified under a reservation or exception in a deed through which the plaintiff claimed title and in which the description of property was followed by the words, "excepting and reserving a right of way or road allowance of two rods in width along the south side of said lot":—Held, that this was only a reservation of a right of way to the grantor and not an exception of the soil. *Wright v. Jackson et al.*, 10 O. R. 470—Q. B. D.

See *Regina v. McDonald*, 12 O. R. 381, p. 382.

## II. HIGHWAYS VESTED IN THE CROWN.

Certain lands on which were two roads called "Water Street" and "The Road to the Wharf," being required for public works, were expropriated by the Dominion Government, and the compensation therefor was claimed by the corporation of the village in which the roads were, and by one R. C. S. through or over whose lands the roads ran. It appeared that the roads were established as public highways by the municipal authorities by by-laws in the years 1842 and 1845, respectively, under 4-5 Vict. c. 10, ss. 39 and 51, although no compensation was paid to the owners therefor:—Held, that although originally the soil and freehold of the roads or streets may have remained in the private owner, subject to the public easement (the right of user); since the year 1853, at all events, they became vested in the Crown as representing the Province of Ontario, by virtue of 22 Vict. c. 99, s. 301, and that the compensation therefor was payable to the attorney-general of Ontario, who was ordered to be made a party in order to give protection to the Dominion Gov-

ernment in expropriating the land. *Re Trent Valley Canal—Re "Water Street" and "The Road to the Wharf,"* 11 O. R. 687.—Boyd.

## III. POWERS, DUTIES, AND LIABILITIES OF MUNICIPAL CORPORATIONS.

### 1. Acquiring Roads.

A road ran between several townships in the defendants' county, and was constructed by a joint stock company. In 1866, the defendants purchased the right of the road company in the road at a sheriff's sale under an execution against the company, and received a deed from the sheriff. A by-law had been passed authorizing the purchase, but through inadvertence was not signed or sealed, but the purchase was recognized in subsequent by-laws, and the defendants took possession of and exercised exclusive jurisdiction over the road, expended some \$2,500 in its repair, and continued to deal with it as their own property until 8th June, 1881, when they passed a by-law divesting themselves of the road, after which the defendants ceased to exercise any control over it:—Held, that the defendants were not liable for the non-repair of the road. *Per Galt, J.*—The defendants never had any authority over the road under the provisions of the Municipal Act; but they acquired the road, and became responsible therefor under their purchase from the road company, which must be deemed valid, the defendants, under the circumstances, being estopped from denying the validity of the by-law authorizing such purchase. They, however, as they had a right to do, had put an end to their liability by the by-law passed divesting themselves of the road. *Per Wilson, C. J.*—The defendants could legally acquire the road by purchase and make themselves responsible for the same under a by-law properly passed for such purpose; and if the defendants are bound by their acts, and are precluded from denying their legal responsibility to maintain the road as a county road so long as they keep it, or if they can be made to perfect the original defective by-law, as to the latter of which propositions he expressed no opinion, they had by the by-law passed therefor, divested themselves of the road and terminated their liability. *Per Rose, J.*—If the defendants had power to purchase the road, and did purchase it, they had power to abandon it, and they had by their by-law exercised such power. *Regina v. The Corporation of the County of Perth*, 6 O. R. 195—C. P. D.

Quere, as to the jurisdiction of a local municipality over a road running within one or more townships or through more than one township.

1b.

P. owned a small piece of land at the south end of a lane or street called Johnson street, 26 feet wide, in the city of Toronto, leading from Adelaide street to King street, extending nearly to the line between these streets, and continued to King street by an irregular private footway. M. and T. owned the adjoining lots on King street, extending back to the centre line, and P. had refused to sell his piece of land to them. They then, with other owners purporting to be owners of adjacent land, petitioned the council under the local improvement clause of the Municipal Act, reciting that they "were desirous of securing communication between King and Ade-



laide streets for vehicles by means of the above street, and certain lanes to the south thereof," and asking that said street might be opened up of the full width of twenty-six feet from Adelaide street to the centre line of the block between King and Adelaide streets at the expense of the property benefited. The sub-committee of the council, to whom this petition was referred, and before whom the plaintiff had appeared to oppose it, said that nothing further should be done without notifying him, but about eight months afterwards, without any further notice to him, they passed a by-law opening up the lane to the centre of the block as prayed, but making no provision for extending it to King street. It was shewn that M. and T., through whose land such extension would pass, had refused to give a right of way for vehicles, as expressed in the petition, and had agreed to pay all costs of opening the lane:—Held, that the by-law had been passed improperly, not in the public interest, but in that of M. and T.; and the corporation, on the application of P., was enjoined from proceeding under it. *Pells v. Boswell et al.*, 8 O. R. 680.—Boyd.

## 2. Opening Roads.

It is discretionary with and not obligatory upon a municipal council to open a road allowance, and the fact that a by-law has been passed does not create such an obligation, and a mandamus was refused. *Re Wilson v. Wainfleet*, 10 P. R. 147.—Rose.

A by-law to establish a road must on its face show the boundaries of the road or refer to some document wherein they are defined; and the intention of the framers of the by-law cannot be ascertained by extrinsic evidence:—Held, therefore that a by-law, to establish a road on a blind line between two concessions in the plaintiff's township was, by reason of such omission, invalid:—Held, also, that there was not sufficient evidence given of statute labour having been performed on the road, so as by reason thereof to make it a highway. *The Corporation of the Township of St. Vincent v. Greenfield*, 12 O. R. 297.—C. P. D.

Held, that an action claiming a mandamus will lie against a municipality for not opening an original allowance for road, by reason of which the occupant of land cannot have access to and from his land, to and from a public road, if there be no other convenient way to and from his land, and if there be no good reason, in respect of means or otherwise, why such allowance should not be opened, and if the work required to be done for that purpose be worth the outlay required to open and maintain the same. *Hislop v. The Township of McGillivray*, 12 O. R. 749—Q. B. D.

Held, that although the municipality must be allowed a very large discretionary power to do or not to do such a work, it has not the sole and uncontrolled right to avoid doing it. Held, also, that if the claim made had been proved as stated, a new trial would have been granted, for the facts found by the jury were not warranted by the evidence. *Ib.*

Where the owners of lands, adjoining original road allowances, laid out roads on their lands

which were used as public roads for upwards of eighty years, the original road allowances being all that time in the occupation of the owners of the lands, and used and treated as their own property, and no evidence was adduced to raise a presumption that compensation had been paid to them for the roads so laid out:—Held, affirming the judgment of Osler, J.A., 8 O. R. 98, that the presumption was that the original road allowances had been taken and used in lieu of the roads laid out by the owners through their lands, and that a by-law to open up the original road allowance as of right, was invalid. *Burritt v. Marlborough*, 29 Q. B. 119, approved; *Cameron v. Wait*, 3 A. R. 175, explained. *Beemer v. The Corporation of the Village of Grimsby*, 13 A. R. 225.

It was contended that since the passing of 44 Vict. c. 24, ss. 15, 16 (Ont.), the only remedy for persons claiming an interest in a road allowance was by arbitration to fix compensation:—Held, that the Act only applies to the case where the council have in good faith intended to open a road allowance, but by mistake have not done so on the true line. *S. C.*, 8 O. R. 98.

On the 13th November, 1883, the Judge of the County Court of the County of Halton, in which county the lands mentioned in the report were situate, after hearing the several parties interested in the said lands and the streets thereon made an order altering and amending the plan thereof by closing up and declaring closed certain streets and parts of streets. Notwithstanding such order the council of the defendant municipality on the 5th of December, 1883, passed a by-law accepting and declaring open some streets so closed, and authorizing and directing the road commissioner to remove all fences and obstructions therefrom; whereupon the plaintiff moved for and obtained an order nisi to quash such by-law, which upon argument before Rose, J., (7 O. R. 192,) was made absolute with costs. On appeal to this Court that order was affirmed, and the appeal dismissed, with costs. Sections 82, 83, 84, 85 of the Registry Act, R. S. O. c. 111, and sections 525, 527 of the Municipal Act considered. *In Re Waldie and the Corporation of the Village of Burlington*, 13 A. R. 104.

## 3. Closing Roads.

A by-law was passed by the defendant municipality to close up and grant to a railway company a portion of a street, by which alone the applicant had access to a piece of land sold and conveyed to him by the municipality at a tax sale, without providing other convenient access to the land. The land was unpatented, but the applicant had paid all dues to the Crown Land Department. The by-law was objected to on the ground that it did not provide other convenient access to the land: that a month's notice of the passing of the by-law was not given, the notice having been given on the 28th of March, for the 28th of April: that it provided for arbitration by the mayor, and by two persons, one appointed by the railway company and one by the applicant, a mode different from that provided by the statute: and that the award was to be made within one month from the date of passing the by-law instead of one month from the appointment of third arbitrator:—Held, that all the objections were well



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taken, and that the by-law was invalid. Held, also, that the applicant had sufficient interest in the land in question to entitle him to apply; and, at any rate, the municipality were estopped by their conveyance from setting that up: that an applicant affected by such by-law is not bound to wait until the road is actually closed before coming to the court. *In re Laplante and the Corporation of the Town of Peterborough*, 5 O. R. 634.—Rose.

Quare, whether there is any power to close up a road of the nature of the one in this case, running through more than one municipality. *Hewison v. The Corporation of the Township of Pembroke*, 6 O. R. 170.—Rose.

A municipal corporation passed a by-law to close up a highway, but the notices of the intended by-law, required to be given under the "Consolidated Municipal Act, 1883," were only published for three successive weeks in a newspaper instead of four, as required by sec. 546 of that Act, and it was not shewn when the six notices required to be posted up were posted, nor what they or the advertisement contained:—Held, in an action for breaking down fences across the road closed up under the by-law, that the notices required to be given were conditions precedent, the due performance of which were essential to the validity of the by-law. *Wannamaker v. Green et al.*, 10 O. R. 457.—Q. B. D.

Held, that a by-law closing a road across a lot when there was more than one road was void for uncertainty in not shewing which road was meant. *Id.*

#### 4. Repairing Roads.

Held, that a prohibition would not lie to the Fourth Division Court of the District of Muskoka, no notice having been given as required by 48 Vict. c. 14, s. 1 (Ont.), amending s. 14 of 43 Vict. c. 8 (Ont.), disputing jurisdiction of said court; and that in any case prohibition would not lie in this case, the title to the road, upon which the injury complained of arose, not being in question, the road being a colonization road built by the government before the organization of the townships of Medora and Wood as a municipality, and the question arising not being one of title but of liability to keep in repair a road so built. Per Wilson, C. J. The road in question was a colonization road vested in "the Crown or in a public department or board," and which had not been renounced by proclamation, and the municipality were not bound to repair it. *In re Knight v. The United Townships of Medora and Wood*, 11 O. R. 138.—Q. B. D. Affirmed 14 A. R. 112.

In an action against a township charging, (1st) the stopping up of a highway, thereby preventing access to plaintiff's farm; (2nd) the obstructing of a highway, thereby, &c.; (3rd) the not maintaining and repairing a highway, thereby, &c., it appeared that the part of the highway in question was part of the original allowance for road which had never been opened or made fit for travel, and that physical obstacles prevented its being made fit for use except at a very large expense. It also appeared that the defendants had procured another site for a road, by which the plaintiff had access to and from his property,

although not so convenient to him as the road in question if opened up would be: the defendants, however, had, in endeavouring to procure for the plaintiff a more suitable road to the east, been prevented by him from doing so, a road to the west they still offered to him:—Held, per Wilson, C. J., that the defendants were not liable under the circumstances for not maintaining and repairing the road. Per Armour, J. That the locus in quo, though a highway in law, was not one in fact, and that the action would not lie. Per O'Connor, J., that the action was sustainable in law, and the verdict was supported by the evidence. *Hislop v. The Township of McGillivray*, 12 O. R. 749—Q. B. D.

An appeal from the judgment of Rose, J. (not reported), dismissing an application under 46 Vict. c. 18, s. 535 (Ont.), for a mandamus to compel the repair by the county of Haldimand of an existing bridge or the construction of a new one over the Oswego Creek, where it crosses the boundary line between the townships of Moulton and Haldimand, by reason of the judges of this court being divided in opinion, was dismissed. Per Hagarty, C. J. O., and Osler, J. A.—Indictment was the appropriate remedy. The court below had the right to grant the writ in its discretion, which was, however, properly exercised in refusing it. Per Burton and Patterson, J.J.A.—The duty under the statute is not the general obligation to keep highways and bridges in repair, but is a specific duty like that cast upon railway companies by their charters with respect to the restoration of roads or the building of bridges. The existence of liability to indictment does not of necessity exempt from compulsion by mandamus any party charged by statute with a specific duty. Indictment would in this case be neither a specific nor an adequate remedy, and a mandamus should have been granted. The demand made upon the county council previous to the application was sufficient. Per Osler, J. A.—The demand was insufficient. Per Curiam—The county council were liable for the non-repair of the bridge in question. *In re The Corporations of the Townships of Moulton and Canborough, and the Corporation of the County of Haldimand*, 12 A. R. 503.

#### 5. Liability for Damages in Constructing Roads.

In pursuance of the powers conferred by ss. 551 and 553 of the Municipal Institutions Act, R. S. O. 174, the council of the defendant municipality passed a by-law authorizing the paving of F. street with cedar blocks, which work was proceeded with, but executed in such a manner as to cause water to flow over and rest upon the lands of the plaintiff:—Held (affirming the judgment of Proffoot, J., who found that the work had been negligently performed), that the plaintiff was entitled to recover the amount of damages sustained by her, and to enjoin the defendants from further overflowing the land; and that in consequence of such negligence her proper remedy was by action, not by a proceeding under the statute for compensation. *McGarvey v. The Corporation of the Town of Strathroy*, 10 A. R. 631.

The corporation of the city of Toronto, in the exercise of its corporate powers, necessarily raised the sidewalk in front of plaintiff's premises

whereby, as was alleged, the plaintiff's premises were injuriously affected, he having had to raise his premises to the level of the sidewalk. In an action to recover the expense occasioned thereby:—Held, on demurrer, that this was not the subject of an action, but for compensation under the arbitration clauses of the Municipal Act, 1883. *Adams v. The Corporation of the City of Toronto*, 12 O. R. 243.—Wilson.

By a special Act of the legislature of Ontario, 45 Vict. c. 45, provision was made for the construction of a subway or subways as a means of crossing certain railways entering the city of Toronto, part of which had to be constructed within the city, and part within the adjoining municipality of the village of Parkdale, and in consequence of a disagreement between the city and the village as to the terms upon which the undertaking should be proceeded with, the latter united with the railway companies in obtaining an order in council under the Dominion Act, 45 Vict. c. 24, authorizing the companies to execute the work, and the latter entered into an agreement with the village authorities that they should construct the same, which they proceeded to do. In an action against the village brought by the holders of property in the city and village, which was greatly damaged by the mode of executing the work:—Held, (reversing the judgment of the courts below, 7 O.R. 270, 8 O.R. 59.—Hagarty, C. J. O., dissenting,) that the municipality was not answerable for any damages caused by the works. Per Hagarty, C. J. O. The defendants could not legally undertake the work merely as the agent of the railway companies, and can only be treated as principals; the plaintiffs are entitled to a reference as to the compensation to be awarded to them. Per Burton, J. A. When the council of a corporation professing to act under the authority of the corporation does acts which are injurious to others, if the objects and purposes which they propose to accomplish are not within the scope of the corporate duty imposed on it by law, the corporation is not liable. What the corporation attempted to do here was not to put in force any of the corporate powers of the municipal body, but the powers supposed to be possessed by the railway companies, and for this reason they are not liable. Per Osler, J. A. If the defendants could act as agent of the railway companies they can defend themselves just as an individual could do under the authority of the railway Act and order in council; if they could not so act it is equally open to them to defend themselves from liability as a corporation, and either way the plaintiffs fail. *West v. The Corporation of the Village of Parkdale—Carroll et al. v. The Corporation of the Village of Parkdale*, 12 A. R. 393. Reversed by Privy Council.

See also *Quillinan et al. v. The Canada Southern R. W. Co. et al* 6 O. R. 567, p. 575.

#### 6. Liability for Injuries on Roads.

A building was being erected on a street in the village of Blenheim. It had a basement several feet deep, the joists of the first floor being about level with the sidewalk. For the purpose of excavating the basement planks for the distance of twenty feet had been removed from the sidewalk, and the earth taken away so as to form a grade into the basement, planks being laid across the

space so made. In the centre of the basement wall, where the door-way was, there was a hole made by the grade into the cellar. During the daytime a plank was laid from the planks across the sidewalk to the first floor, which it was customary to remove at night, and there was no direct evidence that it was not removed on the night in question. On the outside of the sidewalk there was a pile of stones and bricks, and the road was muddy. The plaintiff, who knew of the dangerous character of the place, was at night going along the sidewalk, and while in front of the building met two persons. He then stepped to the right on to the ground next to the building, standing still till the persons had passed by, when, on attempting to proceed himself, he struck against something and fell into the hole made by the grade into the cellar, and was injured:—Held, that the defendants were guilty of negligence: and that there was no evidence of contributory negligence on the plaintiff's part. *Copeland v. The Corporation of the Village of Blenheim*, 9 O. R. 19—C. P. D.

The plaintiff, while crossing a street in the city of L., stumbled against the end of a sidewalk, which was constructed of asphalt boxed in with boards, and was some four inches higher than the crossing, and, falling, was severely injured:—Held, (Wilson, C. J., dissenting), that there was evidence of negligence on the defendants' part that must have been submitted to the jury; and that they having found in favour of the plaintiff, their verdict could not properly be interfered with:—Held, also, no misdirection to tell the jury that they might or might not, as they thought proper, infer from the evidence, though there was no evidence of it, that if the roadway was at that level when the accident occurred, it had been filled up between then and the examination of it by the defendants' witnesses, who stated that they found the depression much less than it was stated to have been when the accident took place. *Goldsmith v. The City of London*, 11 O. R. 26—Q. B. D.

The plaintiff, a resident inhabitant of the town of Prescott, whilst proceeding along one of the sidewalks of the town attempted to cross from one side of such walk to the other over an accumulation of hard beaten snow, where there was a slight declivity in the sidewalk, and in doing so slipped and fell, thereby injuring herself:—Held, reversing the judgment of the Q. B. D., (7 O. R. 261,) that there was no proof of such accumulation of snow as indicated negligence on the part of the defendants, and there being no evidence of negligence in the construction of the sidewalk the corporation was not liable. *Bleakley v. The Corporation of Prescott*, 12 A. R. 637.

In an action against the town of Portland for damages arising from an injury caused by a defective sidewalk, the evidence of the plaintiff shewed that the accident whereby she was injured happened while she was engaged in washing the window of her dwelling from the outside of her house, and that in taking a step backward, her foot went into a hole in the sidewalk, and she was thrown down and hurt; she also swore that she knew the hole was there. There was no evidence as to the nature and extent of the hole, nor was affirmative evidence given of negligence on the part of any officer of the corporation. The jury awarded the plaintiff \$300 damages,

centre of the basement was, there was a hole in the cellar. During the trial from the planks across the street, which it was customary, and there was no evidence that it was not removed on the outside of the sidewalk, and bricks, and the plaintiff, who knew of the place, was at the sidewalk, and while in the presence of two persons. He then fell into the hole in the ground next to the persons had passed, and proceeded himself, he fell into the hole in the cellar, and was injured. Defendants were guilty. There was no evidence of the plaintiff's part. *On the Village of P. D.*

passing a street in the city at the end of a sidewalk of asphalt boxed in on the four inches higher sidewalk, was severely injured. J., dissenting, that negligence on the defendant was submitted to the jury, and found in favour of the plaintiff. It could not properly be said, no misdirection to the jury, or might not, as they had the evidence, though they found that if the roadway accident occurred, it was then and the examination of witnesses, who stated that the accident took place much less than it was when the accident took place. *City of London, 11 O.*

inhabitant of the town injured along one of the sidewalks to cross from the sidewalk over an accident, where there was a sidewalk, and in doing so, she injured herself. Judgment of the Q. B. D., (7) no proof of such accused negligence on the part of the defendant, there being no evidence of construction of the sidewalk was not liable. *Bleak v. Prescott, 12 A. R. 637.*

town of Portland for injury caused by a negligence of the plaintiff whereby she was injured was engaged in washing from the outside of the sidewalk, and in doing so, she also swore at the plaintiff. There was no evidence of the negligence given of negligence of the corporation. Plaintiff \$300 damages,

and a rule nisi for a new trial was discharged:—Held, per Taschereau and Gwynne, J.J., that there was no evidence of negligence to justify the verdict of the jury, and there must be a new trial. Per Henry, J., that there was evidence of negligence on the part of the officers of the corporation, but the question of contributory negligence was not properly submitted to the jury, and there should, therefore, be a new trial. Per Ritchie, C. J., and Fournier, J., that the plaintiff was neither walking nor passing over, travelling upon, nor lawfully using the said street as alleged in the declaration, and she was therefore not entitled to recover. *The Town of Portland v. Griffiths, 11 S. C. R. 333.*

#### IV. ROAD COMPANIES.

By R. S. O. c. 152, five persons are allowed, on taking certain steps, to form themselves into a company for the purpose of either making a road or purchasing one already constructed, without the sanction of any authority, executive or judicial. Such proceeding is wholly the act of the parties, and no conclusive force is afforded by the certificate of registration issued by the registrar under the 15th section of the Act. Therefore, where one W., with his wife and two sons—one a minor—together with another relative, by an instrument in the form required by the statute, executed by them, and duly registered, declared that they had formed a joint stock company (limited) for the purpose of purchasing the roads, franchise, &c., of the Hamilton and Milton Road Company, &c., with a capital stock of \$5,000, the whole amount of which was subscribed for by these persons, on which they had paid 5 per cent. into the hands of the treasurer of the company—another son of W.—and all five of the shareholders were duly chosen directors; and having thus purported to constitute themselves a company, they purchased the roads from the companies holding the same at the alleged price of \$31,000; and subsequently brought action to recover tolls said to be due for the use of the road:—Held, reversing the judgment of the court below, that, by reason of the infancy of one of the subscribers, the company had no legal existence at the time of the registration of their declaration of incorporation, and that no subsequent ratification by him after attaining majority could validate his contract, and:—Quere, whether the contract was signed by more than three persons capable of contracting, as the Married Woman's Property Act, 47 Vict. c. 19, (Ont.), did not enable married women to bind themselves personally by their general contracts:—Held, also, that the amount of the stock subscribed could not be said to be sufficient in the judgment of the shareholders as required by the statute as a condition precedent to the incorporation of a company to purchase a road. *Hamilton and Flamborough Road Co. v. Townsend—Hamilton and Flamborough Road Co., 13 A. R. 534.*

#### V. TOLLS.

Held, on demurrer to the statement of defence herein, omitting the allegation of demand and refusal of toll at the gate, under R. S. O. c. 152, s. 131, and a seizure immediately following thereon, that the demand should have been at the gate,

and the seizure should have followed immediately thereupon; and that the statement of defence was therefore bad. *Enrick et al. v. Township of Yarmouth, 9 O. R. 162.—Rose.*

By agreement made in the year 1869, between a road company and the city of Hamilton, the road company were to extend their road from a point near the Desjardins Canal into the limits of the city, and as part of such road should build a bridge over the canal, the city to lend the road company \$5,000 for ten years at the nominal rate of interest of one per cent.; and a by-law was passed by the city to give effect to the agreement, the by-law containing a proviso that no toll should be exacted from any parties residing upon or owning property within the limits of the city on passing over said bridge. The road was subsequently extended into Hamilton, and a toll gate erected within the city limits. Litigation afterwards arose between the road company and the city, the Great Western Railway Company, and the Desjardins Canal Company, as to the erection of the bridge which was continued until 1874, when a settlement was effected by its being agreed by all parties that a fixed stationary bridge should be erected and maintained by the road company free from any toll thereon, which was legalized by 37 Vict. c. 73 (Ont.). The defendant, passing through the said toll-gate, refused to pay toll, on the ground that the by-law was ultra vires:—Held, that the proviso in the by-law was not ultra vires, for the road company could agree not to exact tolls from any person or body of persons, as there was nothing in the Act of incorporation which prevented their doing so; that the city of Hamilton had paid a substantial sum for the privilege; and there was no discrimination as regarded the residents thereof; and that the proviso only applied to the non-exaction of tolls on the bridge, and had nothing to do with the road, and was legalized by the 37 Vict. c. 73 (Ont.). Held, also, that an objection that the location of the road had not been made prior to the passing of the by-law was not tenable after the road had been located and in use for more than fifteen years. *The Hamilton and Flamborough Road Company v. Binkley, 9 O. R. 621.—Rose.*

#### VI. OBSTRUCTION OF ROADS.

See *Toronto Street R. W. Co. v. Dollery et al., 12 A. R. 679, p. 5.*

#### VII. MISCELLANEOUS CASES.

Sale of land according to plan. Rights of purchasers as to lanes, &c. See *Carey v. The City of Toronto, 11 A. R. 416.*

Prohibition to Judge of the County Court to prohibit him from amending a registered plan so as to close up a portion of a street. See *In re The Corporation of the Town of Oakville and Chisholm et al., 9 O. R. 274.*

Traction engines and the use of steam power on highways. See *The Corporation of the County of York v. The Toronto Gravel Road and Concrete Co., 11 A. R. 765.*

#### WIDOW'S ELECTION.

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## WILL.

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## 1. COMPETENCY OF TESTATOR.

P. L., executor under the will of the late W. R., sued W. C. A., curator of the estate of W. R. during the lunacy of the latter, to compel W. C. A. to hand over the estate to him as executor. After preliminary proceedings had been taken, E. R. (the appellant) moved to intervene and have W. R.'s last will set aside, on the ground that it had been executed under pres-

sure by D. J. M., W. R.'s wife, in whose favour the will was made, while the testator was of unsound mind. The appellant claimed and proved that D. J. M. was not the legal wife of W. R., she having another husband living at the time the second marriage was contracted. W. R. who was a master pilot, died in 1881, having made a will two years previously. His estate was valued at about \$16,000. On the 4th October, 1878, W. R. made a will by which he bequeathed \$4,000 and all his household furniture and effects to his wife J. M., \$2,000 to his niece E. R., \$1,000 to F. S. for charitable purposes, and the remainder of his estate to his brothers, nephews, and nieces in equal shares. On the 8th of the same month he made another will before the same notary, leaving \$800 to his wife J. M., \$400 to each of his nieces M. and E. R., and \$400 to his brother, with reversion to the nieces if not claimed within a year, and the remainder to E. R. On the 27th November, 1878, W. R. made another will which is the subject of the present litigation, and by which he revoked his former wills and gave \$2,000 to F. S., for the poor of the parish of St. Roche, and the remainder of his property to his "beloved wife J. M." On the 10th January following W. R. was interdicted as a maniac, and a curator appointed to his estate. He remained in an asylum until December, 1879, when he was released, and lived until his death with his niece E. R., sister of the appellant. Chief Justice Meredith upheld the validity of the will, and his decision was upheld by the Court of Queen's Bench. On appeal to the Supreme Court of Canada:—Held, (1) reversing the judgments of the courts below, Ritchie, C. J., and Strong, J., dissenting, that the proper inference to be drawn from all the evidence as to the mental capacity of the testator to make the will of the 21st November, was that the testator, at the date of the making of the will, was of unsound mind. *Russell v. Le-francois*, 8 S. C. R. 335.

The testator a man of education and a minister of the Presbyterian Church, had become so weakened by illness as to be confined to his bed for some time prior to his death, and a day or two before that occurred executed a will by affixing what was intended as his mark thereto, the instructions for which were entirely obtained by the person preparing it, by putting questions to the testator as to the disposition of his different properties, and suggesting also the objects of his bounty; such will, when drawn, having been read over to the testator clause by clause, who expressed his assent to some of the bequests, while as to others he made intelligent remarks, and some changes in the provisions thereof. The court (*Blake v. C. S. S. S.*, 253), in a suit brought to impeach the will, having been obtained by fraudulent means and undue influence of persons benefiting thereunder, as well as by the persons concerned in the preparation of the will, refused the relief sought, and dismissed the bill, with costs to be paid out of the residuary estate, although it was shewn that though notice had been given to the testator, he was wholly unprepared to make the will when he came to the act; that there had not been any previous intention on his part to make a will; that he was a man who, when in possession of his mental faculties, was not likely to take suggestions from others; that not a single bequest



681, (who held that the word "effects" was wide enough to carry the real estate) that the grandchildren were entitled to the said lands, as well as to the personal estate, of which the testatrix died seised and possessed, not specifically disposed of by the will. *Hammill et al. v. Hammill et al.*, 9 O. R. 530.—Chy. D.

A testator, by his will dated May 19th, 1873, devised to R. M. the "property on H. street," and proceeded: "I give all the rest and residue of my estate, real, personal and mixed, which I shall be entitled to at the time of my decease, to A. M." At the date of the will he possessed only one property on H. street, known as the Red Lion Hotel, but he subsequently acquired other property on that street:—Held, that, notwithstanding R. S. O. c. 106, s. 26, the after-acquired property on H. street did not go to R. M., but fell into the residue. The testator having expressed his intention with reference to all land acquired by him after the date of his will by appropriate words in that will, it would be going contrary to that intention to declare that some after-acquired property should be withdrawn from the residuary clause and held to pass under the prior specific devise. *Lord Lifford v. Powys Keck*, 30 Beav. 300, distinguished. *Morrison v. Morrison et al.*, 9 O. R. 223.—Boyd.

The above judgment sustained on appeal to the Divisional Court, Proudfoot, J., dissenting. Per Boyd, C.—The residuary clause in the will covers unquestionably all that the testator might acquire subsequent to the date of the will and down to the day of his death. Per Proudfoot, J.—There is nothing in the will indicating that the testator was referring to a specific piece of property. The words, "The property on Hughson street," read immediately before the death of the testator, would apply to all the lands on Hughson street he then possessed, which, therefore, all passed to Robert Morrison; and the will should be thus read under R. S. O. c. 106, s. 26. Per Ferguson, J.—The will shows an intention on the part of the testator that his subsequently acquired property should be disposed of differently from the property vested in him at the time of the making of the will, and thus the "contrary intention" mentioned in sec. 26 of R. S. O. c. 106, appears by the will, which consequently does not "speak or take effect as if executed immediately before the death of the testator." *S. C.*, 10 O. R. 303.—Chy. D.

See *In re Melville*, 11 O. R. 626, p. 726.

## 2. Description of Land.

A. McL. S. being the owner of a 200 acre lot, and having disposed of twelve acres at the north-east corner and five acres in the centre portion in his lifetime, by his will devised as follows: First, I devise and bequeath unto W. A. S. the easterly part of my lot No. 6, \* \* \* being described as one-third part of the length and the entire width, measuring westward from the easterly limit of the said lot, No. 6, and containing sixty-six and two-thirds acres, more or less. Second, I devise and bequeath unto H. D. S., the middle part of my said lot No. 6, in \* \* \* being described as one-third part of the length and the entire width, measuring westward from the land hereinbefore devised to W. A. S. of the said lot No. 6, and

containing sixty-six and two-thirds acres more or less. Third, I devise and bequeath to my daughter A., the wife of J. B., of \* \* \* the remaining one-third part of my said lot No. 6, in \* \* \* being described as one-third of the length and the entire width of the said lot No. 6, measuring westward from the land hereinbefore devised to H. D. S., and extending to the westerly limit of said lot No. 6, containing by admeasurement sixty-six and two-thirds acres, more or less. To have and to hold the said hereby devised land and premises, unto and for the use of my said daughter A., for and during the term of her natural life, with remainder thereof on her decease to the children of her body, and their heirs and assigns for ever. A codicil provided as follows: I do hereby alter my said will, so that if my said daughter A., the wife of J. B., die without issue, or should outlive her issue, the remainder thereof shall revert to my own heirs, share and share alike:—Held, that each of the three devisees took under the will according to the measurements given, that is to say, one-third part of the length of the lot, and the whole width of it, and only such portion of his or her respective parcel thus described, as the testator had title to and power to give, and that it could not be held that what land the testator had was to be equally divided amongst his three children. *Saunders v. Breake*, 5 O. R. 603.—Chy. D.

## 3. Particular Words and Expressions.

A testator died in 1847 leaving a will in which, after devising his farm to his wife for life, and at her decease to be divided by his executors between his sisters F. or H. in certain proportions, he continued: and in case either or both of my sisters F. and H. die previous to my decease, then my will is that each of their portions devised to them respectively, shall be by my executors divided between their and each of their heirs, share and share alike, that is each sister's share to each sister's children, to them their heirs and assigns for ever. The testator's sister H. predeceased him, leaving children, who survived him, and having had also a daughter, who predeceased her, leaving a son, H. H.:—Held, that H. H. took no share of the devise to H., for it was clear the testator was using "heirs" in a colloquial and not a technical sense, as meaning "children," and the legal construction of the word "children" accords with its popular signification, viz., as designating immediate offspring. *Paradis et al. v. Campbell et al.*, 6 O. R. 632.—Proudfoot.

Child or children. See *Stobart v. Guardhouse*, 7 O. R. 239, p. 732.

The words, "child or other issue," in R. S. O. c. 106, s. 25, mean legitimate child or other legitimate issue. See *Hargraff et al. v. Keegan et al.*, 10 O. R. 272, p. 749.

Heirs. See *In re Biggar—Biggar et al. v. Stinson et al.*, 8 O. R. 372, p. 740.

Heirs of the body. See *In re Cleator*, 10 O. R. 236, p. 732.

Offspring. See *Sweet et al. v. Platt et al.*, 10 O. R. 229, p. 734.

Effects. See *Hammill et al. v. Hammill et al.*, 9 O. R. 530, p. 727.





from the company, and the balance he gave to his wife:—Held, that the devise to the eldest son was a devise in fee simple, subject to an executory limitation over on his dying under twenty-five and without issue, and as issue was left, the infant was entitled to the land, as her father's heiress-at-law subject to her mother's dower:—Held, also, that the \$2,000 was an absolute bequest, with a direction as to its application, and that the legatee was entitled to the money regardless of the particular mode of its application. *Cook v. Noble*, 5 O. R. 143.—Proudfoot.

A testator devised as follows: 1. I will and direct that all my just debts and funeral expenses be paid by my two sons, A. & B., share and share alike, and I hereby charge the estate hereinafter devised to them with the said payments \* \* 3. I give and devise unto my son B. the north part of lot 24, to have and to hold unto the said B., his heirs and assigns to and for his and their sole and only use forever \* \* 6. I desire it should be distinctly understood that the property hereinbefore devised unto my two sons, A. & B., is to be held by them only during their life times and then to become the property of their heirs, and that they, my said sons, shall have no power to convey or dispose of the said lands in any manner whatever:—Held, that the rule in Shelley's case applied, and B. took an absolute and unconditional estate in fee simple, and that the limitations contained in clause (4) were void as repugnant to the estate devised by clause (3) and unreasonable. *Re Casner*, 6 O. R. 282.—Proudfoot.

E. R. W. was a devisee under the will of her father R. B., of certain real estate in Toronto, the material parts of which will were as follows: "After the death of my wife I direct the said freehold and leasehold property to be for the benefit of my son R. and my daughters M. and E., their heirs and assigns, to be divided in the manner following." He then gave a part to the son R. and proceeded thus: "The freehold property I hold at present on Jarvis street in this city, to be divided in two lots from Jarvis street (to?) Mutual street, the lot with the house to be given to M. L. to hold for her benefit during her natural life and to dispose of the same by will and testament only, the remaining lot thirty-five feet wide on Jarvis street, running through to Mutual street, I bequeath to my daughter E. R. and that she shall not dispose of the same only by will and testament, and if either of my said daughters shall depart this life without leaving issue, then and in such case the survivor shall be possessed of the share of 'the deceased sister.'" E. R. W. contracted to sell the property devised to her when the purchaser objected to complete the purchase on the ground that she had only a life estate in it. On an application under the Vendors and Purchasers Act, R. S. O., c. 109. It was:—Held, that E. R. W. took an estate in fee simple, which was however restricted by a condition against alienation in any manner, except by a testamentary instrument and that such restraint was valid. *Re Winstanley and southerly thirty five feet of Lot 11 west side of Jarvis St., Toronto*, 6 O. R. 315.—Chy. D.

T. S. after providing for his widow in his will, made the following devise: "And I give and devise to my nephew R. S., lot No. 30 in the 2nd

con., said township of Etobicoke, during the term of his natural life, (excepting he have a child or children) if not at the expiration of his life to go to my daughter Ann Guardhouse or her heirs, &c., \* \* ." The will also contained a residuary devise in favour of the testator's widow, R. S., took possession, married, had children and died leaving his widow and several children. In an action by the widow of T. S., claiming that R. S. was only entitled to a life estate in the lot and that she was entitled to it in fee under the residuary clause. It was:—Held, following *Lethieullieur v. Tracy*, 3 Atk. 796, that an estate in fee might by implication be vested in the child or that the testator's intention might be properly effectuated by applying the rule in *Bifield's case*, (acted upon in *Doe d. Jones v. Davies*, 4 B. & Ad. 55), and reading "child or children" as nomen collectivum, and so creating an estate tail in R. S. Under the circumstances in this case "child" was not a designatio personæ, but comprehended a class and therefore the plaintiff must fail. *Stobart v. Guardhouse*, 7 O. R. 239.—Boyd.

#### (b) Estate Tail.

M. C. by her will devised as follows: "First, I give and devise to my grandson, J. C., the farm \* \* to have and to hold the same and every part thereof for and during his natural life, and after his death to the heirs of his body, should he leave any such, him surviving, and in the event of his leaving no such heirs, then the same and every part thereof is to be divided as fairly and equally as may be, amongst \* \* to have and to hold the same to them, their heirs and assigns forever; but my will and desire is that my said grandson, J. C., shall not have or go into the possession \* \* until he shall have attained the age of twenty-five years, or five years after my death. Secondly, I give and bequeath to my son, J. C., \$100 annually during his natural life, the same to be paid to him quarterly \* \* and to be a charge on the farm of homestead above devised to his said son John:—Held, reversing the decision of Proudfoot, J., that the effect of the limitations was to give J. C. an estate tail, which he had barred as the result of his dealings with the land by way of conveyance. *Greenwood v. Verdon*, 1 K. & J. 74, distinguished. Per Proudfoot, J.—"Heirs of the body" mean heirs of the body living at the death of J. C. J. C. took only a life estate, and his heirs of his body would take as purchasers a fee simple, if at J. C.'s death there were no heirs of his body, the estate would go to his then living brothers and sisters in fee simple. *Eden v. Wilson*, 4 H. L. C. 257 distinguished. *In Re Cleator*, 10 O. R. 326.—Chy. D.

See *Stobart v. Guardhouse*, 7 O. R. 239, *supra*; *Riddell v. McIntosh et al.*, 9 O. R. 606, p. 733; *Sweet et al. v. Platt et al.*, 10 O. R. 229, p. 734.

#### (c) Life Estate.

A testator, by his will, dated June 25th, 1866, devised to the plaintiff "and his heirs and executors for ever," a parcel of land, subject to the following proviso: "That he neither mortgage nor sell the place, but that it shall be to his children after his decease." The plaintiff had

cooke, during the term of his life, and after his death, to have a child or children of his life to go to the house or her heirs, and so contained a residuary estate to the testator's widow, and children and several children. In the case of T. S., claiming that a life estate in the lot was given to it in fee under the will. —Held, following *Atk. 796*, that an estate in fee vested in the child, and the intention might be proved by the rule in *Biffeld v. Jones v. Davies*, 4 O. R. 239, that a "child or children" meant "child or children" in the circumstances in this case, and that the plaintiff was entitled to the land. —*Held*, that the devisee J. S. took a life estate with remainder to his child or children; and not an estate in fee, under the rule in *Shelley's Case*. *Smith v. Smith*, 8 O. R. 677. —Boyd.

#### Life Tail.

—Held as follows: "First, that the devisee J. S. took a life estate in the land, and every child or children of his body, should survive, and in the case of such heirs, then the same estate was to be divided as fairly amongst the children, or to have to them, their heirs and assigns, and I give and bequeath to my son J. S., for the term of his natural life, the farm I purchased \* \* \* but if my said son J. should leave lawful heir or heirs, then said lands shall be equally divided among them on the death of their father, but if my said son J. S. shall die without leaving lawful heirs, then in that case I direct the said lands shall be sold and the proceeds thereof to be equally divided among my remaining children or their heirs." The son J. S. had been married for some years at the date of the will, and had a daughter after that date, who with her father was living at the time of the testator's death. —Held, that the devisee J. S. took a life estate with remainder to his child or children; and not an estate in fee, under the rule in *Shelley's Case*. *Smith v. Smith*, 8 O. R. 677. —Boyd.

In another clause of the will, the testator devised certain other lands to his son W. M. "for and during and unto the end and term of his natural life," and after the determination of that estate to the sons of the body of W. M. in tail male, as they should be in point of birth, and for want of such issue to the daughters of the body of W. M. and the heirs of the body of such daughters, who were to take as tenants in common, and for want of such issue, the lands were to be divided amongst the testator's other sons, or the heirs of their respective bodies, who at the death of W. M. should be entitled to any part of the lands devised in tail in the will to hold to his said other sons respectively, or the heirs of their respective bodies in the same course of descent in tail as the other lands devised to them in tail respectively, and for default of such other sons and of their issue at the death of W. M. to the right heirs of W. M. for ever:—Held, that W. M. took a life estate, with remainder in tail male, to his first and other sons successively, according to priority of birth, and failing male issue, with a further remainder to his daughters. And though circumstances might arise in which W. M. would have an estate in tail by way of remainder after the intermediate limitations to his first and succeeding sons, yet he could not so deal with that ultimate remainder as to divest their right to take as purchasers. *Riddell v. McIntosh et al.*, 9 O. R. 606. —Boyd.

#### Estate.

—Held as follows: "First, that the devisee J. S. took a life estate in the land, and every child or children of his body, should survive, and in the case of such heirs, then the same estate was to be divided as fairly amongst the children, or to have to them, their heirs and assigns, and I give and bequeath to my son J. S., for the term of his natural life, the farm I purchased \* \* \* but if my said son J. should leave lawful heir or heirs, then said lands shall be equally divided among them on the death of their father, but if my said son J. S. shall die without leaving lawful heirs, then in that case I direct the said lands shall be sold and the proceeds thereof to be equally divided among my remaining children or their heirs." The son J. S. had been married for some years at the date of the will, and had a daughter after that date, who with her father was living at the time of the testator's death. —Held, that the devisee J. S. took a life estate with remainder to his child or children; and not an estate in fee, under the rule in *Shelley's Case*. *Smith v. Smith*, 8 O. R. 677. —Boyd.

children living at the date of the will. The testator died in 1867:—Held, that the plaintiff could not, by his own conveyance, confer an indefeasible title upon an intending purchaser, and that the preferable construction of the devise was to give the plaintiff an estate for life, remainder to his surviving children for their lives, remainder to the plaintiff in fee. *Dickson v. Dickson*, 6 O. R. 278. —Boyd.

J. S. by his will devised as follows: "I will and bequeath to my son J. S., for the term of his natural life, the farm I purchased \* \* \* but if my said son J. should leave lawful heir or heirs, then said lands shall be equally divided among them on the death of their father, but if my said son J. S. shall die without leaving lawful heirs, then in that case I direct the said lands shall be sold and the proceeds thereof to be equally divided among my remaining children or their heirs." The son J. S. had been married for some years at the date of the will, and had a daughter after that date, who with her father was living at the time of the testator's death. —Held, that the devisee J. S. took a life estate with remainder to his child or children; and not an estate in fee, under the rule in *Shelley's Case*. *Smith v. Smith*, 8 O. R. 677. —Boyd.

In another clause of the will, the testator devised certain other lands to his son W. M. "for and during and unto the end and term of his natural life," and after the determination of that estate to the sons of the body of W. M. in tail male, as they should be in point of birth, and for want of such issue to the daughters of the body of W. M. and the heirs of the body of such daughters, who were to take as tenants in common, and for want of such issue, the lands were to be divided amongst the testator's other sons, or the heirs of their respective bodies, who at the death of W. M. should be entitled to any part of the lands devised in tail in the will to hold to his said other sons respectively, or the heirs of their respective bodies in the same course of descent in tail as the other lands devised to them in tail respectively, and for default of such other sons and of their issue at the death of W. M. to the right heirs of W. M. for ever:—Held, that W. M. took a life estate, with remainder in tail male, to his first and other sons successively, according to priority of birth, and failing male issue, with a further remainder to his daughters. And though circumstances might arise in which W. M. would have an estate in tail by way of remainder after the intermediate limitations to his first and succeeding sons, yet he could not so deal with that ultimate remainder as to divest their right to take as purchasers. *Riddell v. McIntosh et al.*, 9 O. R. 606. —Boyd.

J. P., by his will, provided as follows: "I give and bequeath to my brother D. P. the \* \* \* on which he resides \* \* \* to hold the same to the said D. P. for and during his natural life, and after the death of the said D. P., I give and bequeath the said \* \* \* to H. P., second son of said D. P., to be held by the said H. P. for and during his natural life, and if the said H. P. shall leave offspring him surviving, then I give and bequeath the same to such of his offspring as the said H. P. shall appoint, and in case of no appointment being made by the said H. P. in his lifetime, then I devise the same equally to the children of the said H. P. in fee and in case

the said H. P. shall die without lawful offspring or during his father's lifetime, then I give and bequeath the same to \* \* \* D. P. and H. P. by conveyances and mortgages dealt with the land as if they were the owners in fee. After several mortgages to one J. E. who was H. P.'s solicitor, were registered against the land, and after D. P.'s death, J. E., having assured H. P. that his (J. E.'s) title to the land was perfectly good, and that H. P.'s children had no interest in it, persuaded H. P. as a matter of form to execute the power of appointment in favour of L. S., one of his children, and to obtain from L. S. and her husband, without their knowing of the execution of the power of appointment, and on making the same representation and without consideration, a quit claim deed of all their interest in the land. In an action by L. S. and her husband, on discovering their interest, to have the quit claim deed delivered up to be cancelled, and to have it declared that the conveyances and mortgages made by D. P. and H. P. only bound their life estate. It was:—Held, that only a life estate was given to H. P., and not an estate in fee tail. If "offspring" is read as "children," or construed as meaning "issue," the devise falls within the rule that when words of distribution, together with words which would carry an estate in fee are attached to the gift to the issue, their ancestor takes for life only. Here to the children or issue, in default of appointment, is given expressly an estate "in fee," and it is distributed to them "equally":—Held, also, that untrue representations were made which induced the execution of the power of appointment and the transfer of the estate thereunder without consideration; and that the instruments subsequent to the deed of appointment, did not affect the fee simple of the land, and that the operation of the mortgages should be limited to the life estate of H. P. in the land. *Sweet et al. v. Platt et al.*, 10 O. R. 229. —Boyd.

A testator made his will as follows: "I bequeath to my wife E. K. all the real and personal property that I die possessed of \* \* \* My wish and desire is, that she shall divide the said real estate or personal property, £50 to my daughter S., £50 to my daughter E., the balance to my son W. (providing any more) (if a daughter) £50, and if a son then the balance after £50 to each of my daughters to be equally divided betwixt them at her decease":—Held, reversing the decision of *Proudfoot, J.*, that the widow E. K. took a life estate in the whole real and personal property, excepting what was necessary to pay legacies. *Wilson v. Graham et al.*, 12 O. R. 469. —Chy. D.

A. by his will devised as follows: "I give and bequeath to my nephew B., and C. his wife (describing the land), to their use for the term of their natural life, and at their decease to be divided among their children as they may see fit." C., the wife, died, and after her death B. conveyed to one of his children, D. B. and D. then mortgaged to the company, and the company sold to E. under the power of sale in the mortgage, but E. refused to take the company's title:—Held, that B. and C. took an estate for life only: that the appointment in favour of one child to the exclusion of the rest was not a valid appointment, and that the title offered was not one that the purchaser could be compelled to

accept:—Semble, Had a similar appointment been made by both husband and wife it would have been invalid. *Re Ontario Loan and Savings Co. and Powers*, 12 O. R. 582.—Ferguson.

See *Johnson v. Kramer*, 8 O. R. 193, p. 740; *Re Charles—Fulton v. Whatmough*, 10 A. R. 281, p. 737.

(d) *Vested or Contingent.*

A testator left all his estate to his executors "in trust for the benefit of G. H. till he arrives at the full age of twenty-one, at which time I direct my said executors to give to G. H. all the said property," subject to the condition that "should the said W. H. at any time before coming of age go to live with his father, W. H., he is to be disinherited of the whole or any portion of my estate. And the said estate so forfeited is to be then given to my son J. D., his heirs and assigns." The testator died in 1875. In 1876, while G. H. was still a minor, being only eleven years old, J. D. and W. H. entered into an agreement under seal, whereby it was agreed that J. D. should support the widow of the testator, who was his mother and the mother-in-law of W. H., during her life, and should convert into money the estate of the testator, to which he was or should be entitled under the will, and pay a moiety of the proceeds to W. H. in trust for the support of G. H. till he should attain twenty-one, the residue to be then paid by W. H. to G. H. Pursuant to this agreement G. H. forthwith resided with W. H. till he was seventeen years of age, when this action was brought by the executors for a declaration of the rights of G. H., J. D., and W. H. under the will:—Held, that G. H. took a vested interest in the property under the will: that the condition was a condition subsequent, and was void as being "against law;" and G. H. was entitled to all the estate given to him by the will, notwithstanding the agreement of 1876, which could not be regarded as a family compromise, or for the benefit of the infant. *Clarke et al. v. Darrough et al.*, 5 O. R. 140.—Ferguson.

R. C. by his will devised all his personal estate to his wife, M. S. C., to be held for the interest of his son, A. S. C., when he should have arrived at the age of 24 years; an annuity to his wife, M. S. C., for life; appointed her guardian to the son to take charge of all remaining money that should accrue from all sources; such money to be used for the necessary expenses of education, etc., for the son. He desired that the wife should have control of all money coming to the son till he was of the age of 24 years, and at that time all rents and other property should come into his possession, except the annuity. He further declared that at the death of the wife all rents and all interests and all property should pass into the possession of the son, to be owned by him, his heirs and assigns forever. In case of the death of the wife before the son attained 24, another guardian with similar powers was appointed. In case of the death of the son before his mother, then all the property and rents, etc., were to be hers during her natural life, and after her death one half to go to the testator's relatives and the balance to the relatives of the wife, she making this disposition before her death; but if the son at the time of his death should leave a wife or children, then all property should be subject to such disposition as he should make at the time

of his death. On an application, under the Vendors' and Purchasers' Act, R. S. O. c. 109, for the opinion of the court:—Held, that the will was sufficient to pass all the testator's property, including the land in question: that the interest taken by the son was a vested one, and was to come into his possession and control on his attaining 24, and, following *Gairdner v. Gairdner*, 1 O. R. 191, that the son having attained that age the subsequent gift never could affect his interest, which had become absolute. If the lands passed by the will, the son and the widow joining as grantors could convey such title as the testator had. If the lands did not pass by the will, the son as heir-at-law and the widow as to dower could make title. *Re Cooke and Driffl*, 8 A. R. 530.—Ferguson.

A. died leaving two sons and two daughters, and by her will directed that her property should be invested until C., her eldest son, should attain twenty-one; when it was to be divided into four equal shares, and he was to get the income of one share until he attained thirty, when he was to get his share out and out. The other three shares were to be invested, and the income arising from each share was to be accumulated until the remaining three children respectively attained twenty-one, when they were each to receive the annual income thereof, until the youngest (son), F., attained the age of thirty, when he was to get his share out and out, and thereafter the income of the remaining two shares was to be paid equally to the two daughters, C. and J., until one of them should die, and then one share was to be paid to the person or persons who would be entitled thereto under the Statute of Distributions in case such share was the property of the daughter so dying. C. attained twenty-one, married, and died before F. attained twenty-one, having made her will and left all her property to her husband for her children:—Held, that the proper effect of the will of A. was to vest in C.'s husband and children, the one-fourth share that she was to draw the income of for life, and that they were the persons entitled under the Statute of Distributions pertaining to the personal estate of married women who die intestate: R. S. O. c. 125, s. 25. *Arkell v. Roach*, 5 O. R. 699.—Boyd.

A will contained a devise in trust for the support and maintenance of the testator's widow during her life or widowhood, with a direction that she should have the full right to possess, occupy and direct the management of the property: and at her death or second marriage, "my son Thomas, if he be then living, shall have and take lot one, which I hereby devise to him, his heirs and assigns." The testator then gave to his other sons and to his daughters other real estate in fee. He directed that all the said devises "in this section of my will mentioned and devised" should take effect upon and from the death or marriage of his wife, and not sooner. He gave all his other lands in trust for sale, the rents and proceeds to be at his wife's disposal while un-married, and after her death or marriage to be equally divided among his said children. At such death or marriage all his personal property and estate remaining was to be divided equally among his children: Provided always, that in the event of any of his children dying without issue before coming into possession of his

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should go equally among the the survivors and  
their issue; and in the event of such death  
leaving issue, such issue to take the share which  
would have belonged to the parent if then living;  
and lastly, he directed that in the event of his  
wife dying before him his property should be  
disposed of at his death, as therein before directed  
at her death or second marriage, in the event of  
her surviving him, so far as practicable. Thomas  
died unmarried before his mother. On appeal  
from the judgment of the Chancery Division,  
pronounced by Ferguson, J., (29 Chy. 162).  
Per Spragge, C. J. O., and Patterson, J. A.,  
(differing from Ferguson, J.) that the interest  
devised to Thomas was contingent upon his  
surviving his mother. Per Hagarty, C. J., and  
Burton, J. A., (agreeing with Ferguson, J.,)  
that the interest vested in Thomas and was  
disposed of by his will. Per Spragge, C. J. O.,  
and Patterson, J. A. The proviso as to death  
of children with or without issue extended to  
all the testator's property. Per Hagarty, C. J.,  
and Burton, J. A. It was confined to personal  
property. *Keefe v. McKay*, 9 A. R. 117.

A testator directed the trustees under his will  
to hold for accumulation the proceeds and income  
of his personal estate upon certain trusts. He  
also directed with reference to his real estate  
(with the exception of some land in Lindsay)  
that the income should, in the same manner as  
the income from his personal estate, form one  
fund until the death or second marriage of his  
widow and his youngest child should attain  
twenty-one, when the lands were to be sold and  
the proceeds held upon the same trusts as were  
declared concerning the personal estate, which  
were for the children named, in equal shares as  
tenants in common. The will contained a pro-  
vision that in the event of the death of any of  
the children leaving issue, the share of the one  
so dying should be divided among the issue on  
their attaining twenty-one. As to the lands in  
Lindsay, the will contained a power to the trust-  
ees to grant building leases for terms not ex-  
ceeding twenty-one years, and he directed that  
upon the happening of the double event above  
referred to the trustees should hold and apply  
the rents in the same manner and proportions as  
theretofore limited with reference to the accum-  
ulations, and the dividends and income derived  
therefrom. The will further provided that in  
default of any of his grandchildren attaining  
majority the proceeds of all his estate, real and  
personal, should be applied towards founding an  
institution in the city of Toronto for the dumb  
and blind:—Held, reversing the judgment of  
Proudfoot, J., 1 O. R. 362, Burton, J. A., dis-  
senting, that the children took absolute vested  
interests on the happening of the double event.  
Per Burton, J. A., that they took only estates  
for life with remainder to the grandchildren.  
*Re Charles—Fulton v. Whatmough*, 10 A. R. 281.

#### (e) Vested liable to be Divested.

A testator devised certain land to E. T. "dur-  
ing his and M. A.'s natural life, then and after  
that to be given to M. A.'s children to them,  
their heirs and assigns forever"—Held, that  
the children of M. A. in existence at the testa-

tor's death forthwith took vested interests, sub-  
ject to be partially divested in favour of child-  
ren of M. A. subsequently coming into existence  
during the life of M. A., and that the represen-  
tatives of any child dying before the period of  
distribution were entitled to claim the share of  
that child. *Paradis v. Campbell*, 6 O. R. 632,  
distinguished. *Latta v. Lowry et al.*, 11 O. R.  
517.—Boyd.

#### (f) Taking per Stirpes or per Capita.

See *Wood v. Armour*, 12 O. R. 146, *infra*.

#### (g) Executory Devise.

See *Cook v. Noble*, 5 O. R. 43, p. 731.

#### (h) Bequests of Personality.

The will of a testator contained the following  
clause: "To my daughters Elleuor and Mary  
Maria I give, devise, and bequeath the interest  
of three thousand dollars each per annum, to be  
paid to each of them half-yearly"—Held, that  
the devisees took an absolute interest in the  
\$3,000 given to each of them. *Elton v. Sheppard*,  
1 Bro. C. C. 532, followed. *Morrow v. Jenkins*,  
6 O. R. 693.—Proudfoot.

See *In re Biggar—Biggar et al. v. Stinson et al.*,  
8 O. R. 372, p. 740.

#### 7. Conversion.

A testator by his will directed his executors  
to pay his debts, funeral expenses and legacies  
thereinafter given out of his estate, and proceeded:  
"My executors are hereby ordered to sell all my  
real estate, after the payment of all my just debts  
and funeral expenses, and all my property and  
personal effects, money or chattels, are to be  
equally divided between my children and their  
heirs, that is, the heirs of my son G. and daugh-  
ter E., now deceased, and my son J., Mary and  
Hannah, or their heirs. Should any of my said  
heirs not be of age at my death, my executors  
are to place their legacies in some of the banks  
of Ontario until the said heirs are of age":—Held,  
(1) That there was no intestacy either of the real  
or personal estate. It is to be presumed that the  
testator did not intend to die intestate, and the  
language shewed he did not intend his heirs to  
take his property as real estate, as he peremp-  
torily directed a sale, making an actual conver-  
sion of it into money, thus blending the real and  
personal property into a common fund, and then  
bequeathed it all to the legatees. (2) That the  
persons entitled to share under the will took per  
capita and not per stirpes upon the same prin-  
ciple as in the case of *Abrey v. Newman*, 16 Beav.  
431. (3) That the grandchild of G. was not en-  
titled to a share, the children of G. taking in  
their own right and not in a representative capac-  
ity. *Wood v. Armour*, 12 O. R. 146.—Proud-  
foot.

#### 8. Estate or Interest Taken by Trustees or Executors.

The rule is that when property is devised to  
a trustee to pay the rents and profits to any per-



son the cestui que trust is entitled to the possession; but where other parties have also a claim, it rests in the discretion of the court whether the actual possession shall remain with the cestui que trust or the trustee. J. O. by his will provided as follows: "Notwithstanding the directions hereinbefore contained, I desire that if my son W. O. returns to Toronto within five years from the date of my death, my said executors shall hold in trust for him from the time of his return to Toronto said lots Nos. \* \* subject to the existing life estate of my said wife in a portion thereof, during the term of his natural life, and shall pay over to him all rents, issues, and profits thereof, and after his death shall divide the same between his children in such manner as he shall in his last will and testament direct, and in default of such direction and appointment to divide said property equally between them, conveying to each child his or her share when, if a son, he attains the age of 21 years, or a daughter attains the age of 21 years or marries, and in the meantime to apply the proceeds of the same to the support and maintenance of said children." In an action by W. O. against the executors and trustees of the will, claiming the actual possession of the property of which he was entitled to the rents and profits, it was:—Held, that he was not entitled to such possession, and his action was dismissed, with costs. *Whiteside v. Miller*, 14 Chy. 393, commented on and followed. *Orford v. Orford*, 6 O. R. 6.—Ferguson.

J. by his will devised to H., his wife, all his real estate in L. "during her natural life, for the use and support of herself and family, and in case H. should at any time think proper to sell my said estate, it shall be the duty of my executors to sell the same with her consent, and the proceeds thereof to be distributed as follows," &c.: "But if H. should not think proper to sell my said estate, then the same shall be divided amongst my children, their heirs or assigns, after the death of H., share and share alike." He then nominated P. executor of his will, "with full power and authority to act in the same." J. died in 1838, leaving H. and three children him surviving. P. took out probate. In 1846, H. by deed conveyed her estate in the lands for £150 to P. Under this deed P. obtained possession, which he retained till his death in 1882, when he devised the land to K. in trust for the purposes of his will, of which he made K. executor. H. died in 1872, and this action was commenced in 1883, by one of J.'s children, claiming an account against K. of the profits of the lands, and to have the same sold, and the proceeds distributed according to J.'s will:—Held, affirming the decision of Osler, J. A., that P. could not be said to have been an express trustee within R. S. O. c. 108, s. 30, and, that being so, the plaintiff's action was barred by the Statute of Limitations. The proper construction to be placed on the will was, that a life estate was given to H. with a power of sale to P. during her life time with her consent, and the remainder in fee to the children in the event of non-execution of the power: that unless and until the consent of the widow was given, the power of sale did not exist, and the executor had no duty to perform in relation to the lands; and he did not take, nor was it necessary for him to take, the legal estate; that as he never was re-

quired to execute the power, he never became trustee. *Johnson v. Kremer*, 8 O. R. 193.—Chy. D.

A testator, after bequeathing to his wife his dwelling house and furniture and an annuity, continued as follows: "I give and bequeath unto G. B., and her children, the dwelling house they now occupy, \* \* the wife of C. R. B., and his children, appointing C. R. B. and G. B. joint guardians for the children above mentioned, and \$500, all transactions to be null and void unless sustained in writing by both guardians." And in the 10th clause of his will he said: "I will and bequeath unto each of my grandchildren living at my death \$100." C. R. B. was a son of the testator, and had children living at the testator's death:—Held, that the children meant were those of C. R. B. and G. B., and there was a simple gift to G. B. and her children, who took concurrently; and C. R. B. and G. B. were, by the above clause, made trustees for their children, and could give a good acquittance and discharge for the \$500, but they were not authorized to receive, and could not give a good acquittance for, the moneys bequeathed to their children in the 10th clause. In another clause of his will, the testator willed and bequeathed "unto G. G. B.'s wife, E. B., \$5,500. This bequest is under the joint management of G. G. B. and his wife for their heirs, should there be none, then at their death to revert back to my heirs to be equally divided":—Held, that there was a trust of the \$5,500 reposed in G. G. B. and E. B.; that E. B. was entitled to the benefit of the trust during her life, and upon her death the benefit of it would go to any children there might be of G. G. and E. B., or any descendants there might be answering the description "their heirs," and if there were no such children or descendants, then to the heirs of the testator, to be equally divided amongst them. Another clause was as follows: "I will and bequeath unto M. R. B.'s wife and his heirs \$5,000, and appoint M. R. B. as guardian and manager of this bequest":—Held, that a trust of the \$5,000 was thereby reposed in M. R. B., and "heirs" was merely descriptive of the legatees intended. M. R. B. was entitled to receive the fund and hold it in trust. During his life his wife would be entitled to the whole benefit arising from the fund, and on his death there would be a distribution of it amongst his wife, or her representatives, as the case might be, and those persons who would answer the description of heirs of M. R. B.; and M. R. B., as such trustee, was entitled to receive, and could give a good acquittance and discharge for, the money. *In re Biggar—Biggar et al. v. Stinson et al.*, 8 O. R. 372, Ferguson.

A testator directed his executors to pay all his "funeral charges and just debts." The residue of his estate and property not required for that purpose he disposed of as follows: To his wife all his household furniture, his pew in a named church, and all cash in hand at his decease, also to his wife the entire, exclusive and undivided use of his house situate, &c., to hold the same during her natural life, then the proceeds to be equally divided, &c., he also gave and bequeathed the proceeds of the homestead to be equally divided, &c. There were other lands not mentioned in the will:—Held (affirming the judgment of the court below, 8 O. R. 411), notwithstanding





to cases where a recovery is sought not against a defendant personally, but against his estate, and following *Booth v. Coulton*, 2 Giff. 520, that except under extraordinary circumstances upon particular grounds suggested of hardship or peculiarity, interest is not to be allowed upon the arrears of an annuity. In this case, under any circumstances, the award of interest could not be upheld as against the assignee in insolvency:—Held, also, that the expense of some flooring, lathing, and plastering, was properly charged against the defendant, as *W. A. S.* and *G. E. S.* had covenanted to keep the houses tenantable, and these repairs were made because the tenant threatened to leave:—Held, also, on the evidence in this case that the master was right in disallowing a large set off brought in by the defendant over and above the sum of \$16,000 allowed for reconstructing the buildings. *Snarr et al. v. Badenach*, 10 O. R. 113.—Boyd.

A testator gave his son A. his board and lodging and £5 a year during his natural life. He devised to his eldest son a portion of his real estate on condition of his paying A. £3 out of the £5 a year. He further devised another portion of his real estate to his wife for her life, and then to his son R., on condition that R. should pay the balance £2 a year, and keep his son A. in board and lodging during his natural life:—Held, that the annuity to A., though chargeable against different parties, was not separable. (2) That the intention of the testator was to provide for A. from the time of the testator's death, and that R.'s land was chargeable with such £2 a year, and the board and lodging from that time, notwithstanding the tenancy for life. *Munsie v. Lindsay*, 10 P. R. 432.—Hodgins, *Master in Ordinary*.

### 11. Legacies.

#### (a) Abatement.

See *Cook v. Noble*, 12 O. R. 81, p. 748.

#### (b) Lapse.

See *Hargraff et al. v. Keejan et al.*, 10 O. R. 272, p. 749.

#### (c) Charged on Land.

A testator devised his real estate and chattel property (excepting some bequests to his wife) to his son Robert, subject to the payment of his just debts, funeral expenses, and certain specified legacies, which legacies he directed his executors to pay. By a codicil he directed the chattel property (except the specific bequests to his wife) to be sold, and the proceeds equally divided amongst all his children:—Held, that the specific legacies were a charge on the real estate. *Stewart v. Dick*, 10 P. R. 411.—Hodgins, *Master in Ordinary*.

Legacies directed to be paid out of a mixed residue are a charge on land. *Young v. Purvis*, 11 O. R. 597.—Proudfoot.

Right to compel legatee to execute release. See *Kayser v. Boynton*, 7 O. R. 143, p. 403.

See *Munsie v. Lindsay*, 10 P. R. 432, *supra*; *S. C.*, 11 O. R. 520, p. 747.

#### (d) Cumulative or Substitutional.

One S. by his will directed his estate, real and personal, to be sold, except certain stocks, lands, and securities thereafter specifically devised, and that his debts and "testamentary expenses" should be paid out of the first moneys that should come into the hands of his executors; and after making certain pecuniary bequests, which he charged primarily on the fund to be produced by the sale of his real estate as aforesaid, and secondarily on the proceeds of his personal estate, he directed that "as to the residue of my personal estate which may be exclusively devoted by me to charitable purposes, I bequeath the same to the churchwardens of the A. church, to be invested by them for the purpose of forming an endowment for the support of the said church." Afterwards, by a codicil, S. bequeathed to three persons named by him \$30,000 as an endowment for the A. church, to be invested by them in their own names as trustees for the said church, and to be disposed of for the benefit thereof as therein mentioned, but in certain contingencies to merge in his residuary estate, and be disposed of under the last clause of his will, by which he devised all the rest, residue, and remainder of his estate of which he should die possessed to A. and L. to be equally divided between them, share and share alike:—Held, that on a proper construction of the will and codicil, \$30,000 of the pure personality was to be held by trustees on the trust as defined for the benefit of the A. church; and as to the residue of that fund, it was to be held generally by the churchwardens for the support and maintenance of that church. A legatee is entitled to take both a pecuniary gift and a residue, whether given in a will or in a combined will and codicil, and the construction of a particular residuary gift is not affected by the presence or absence of a general residuary gift. *Ball et al. v. The Rector and Churchwardens of the Church of the Ascension et al.*, 5 O. R. 386.—Boyd.

#### (e) Conditional.

A testator bequeathed his chattels and \$1,500 to his widow. His estate he directed to be sold, and the \$1,500 to be paid out of the proceeds. After providing for the investment of the estate, he proceeded: "the yearly interest accruing from the same to be paid over to my said widow yearly for the term of six years, or until my said son shall become twenty-one; 5th. It is my will that to the above-mentioned gifts and bequests to my wife shall be given to her in lieu of dower, and on the further condition that she will clothe, maintain, and suitably provide for my said son until he shall become twenty-one; 6th. It is my further my will that on the coming of age of my said son, my executors shall pay over to him the whole of the principal sum of money remaining in their hands after satisfying the above expenses and legacies; 7th. In case my said son should die before coming of age, then the money so remaining as above, and to which he would be entitled, shall be paid over to my two elder brothers." The son died under twenty-one:—Held, that all the gifts to the widow were upon the condition of maintaining the son; but the condition having become impossible of performance by the son's death, the gifts were deemed of the condition:—Held, also, that the testator's brothers were not entitled to payment of the



estate. For by treating G. in the same manner as J. and L. the testator referred only to the mode of payment, and the power of disposing of the principal, not to the amount of the allowance. *Macdonald v. McLennan*, 8 O. R. 176.—Proudfoot.

G. H. Z. in his will provided, with respect to a certain mortgage, "I give and bequeath out of the proceeds of said mortgage to each of my daughters (naming them) the sum of \$200, to be paid to them respectively when the youngest reaches the age of 21, and if any of them shall not have been married before that time the child or children being then unmarried shall not receive their shares until such times as she or they shall marry. Provided that my executors may pay such part or parts of said legacies to my married daughters before the youngest attains 21 if they can do so without interfering with the proper support of my wife and family. Provided if any of my daughters die without issue the legacy bequeathed to them shall be divided among their surviving sisters. The balance of the proceeds of said mortgage I give and bequeath to my said wife, to have and to hold the same for her use and benefit, and for the use and benefit of the unmarried members of my family, during the natural life of my said wife, after which my will is, that the balance of proceeds of said mortgage still remaining be equally divided among my daughters then surviving."—Held, that the widow held in trust during her life for herself and her unmarried daughter, and that she was bound during her life to apply the proceeds of the mortgage for the proper support of herself and that daughter while unmarried, treating the principal and interest of the mortgage as a blended fund, and what remained was to be divided; and that the widow had the right to draw bona fide from the proceeds of the mortgage even if it consumed the whole of the corpus. *Barclay et al. v. Zavitz et al.*, 8 O. R. 663.—Boyd.

A testator made his will as follows:—"I leave to M. the west half of lot 9 during her natural life. I leave to my son A." (an imbecile) "his board and lodging with £5 per year during his natural life, to be given as hereinafter mentioned. I leave to B." (certain other lands) "under the following restriction: i. e., he is to pay A. £3 every year during his natural life. I leave to R. the west half lot 9, after his mother's death, on the following condition: i. e., £2 in each year to be paid by him to A., and to keep A. in board and lodging during his natural life." The devise to R. failed, he being an attesting witness:—Held, that Adam's maintenance as from the death of the testator, and not as from the death of M., was a charge on the west half lot 9 in the hands of the heirs: and the land having, for some time after the testator's decease, been occupied under mistake of title by R. and his assigns, who had paid for Adam's maintenance, the heirs could not enjoy the land without making good the charge thereon to those who had thus exonerated them. *Munsie v. Lindsay et al.*, 11 O. R. 520.—Boyd.

A testator gave to his executors and trustees, of whom his wife was one, all his real and personal estate, with a direction to convert his personal estate into money, pay debts, and invest the balance. He directed them to pay his wife

from time to time such money as might be sufficient to support, maintain, and educate his family, and to maintain his wife in a manner suited to their condition in life, and for that purpose gave his wife power to collect money and to take therefrom enough to maintain his family and herself. And he directed his sons to pay her \$150 a year after they received their lands, charging it on his lands, but they were not to pay it so long as she and the family were maintained out of the estate. The trustees were to pay \$1,000 to each of the daughters as they attained twenty-one, and if there was not sufficient personal estate to pay them, the balance was to be a charge on the real estate: the real estate was to be divided between the sons when the eldest attained twenty-five, and then the trustees were to give him \$2,000. The balance of the personal estate was to be divided between the sons, the eldest being charged with his \$2,000. The testator's widow married again:—Held, that the children were only entitled to maintenance until they attained their majorities:—Held, also, that the widow was entitled to maintenance until the provision as to the \$150 came into operation which would be when the sons respectively attained twenty-five. Although the maintenance was to be made from the personal estate, and no part of the rents were assigned for that purpose, as the devisees of the real estate were not entitled until they attained twenty-five, the intermediate rents not being disposed of descended to the heirs-at-law, i. e., the children, and might be applied for their maintenance if the personal estate was insufficient. *Cook v. Noble*, 12 O. R. 81.—Proudfoot.

When a testator has himself specified the time for the duration of maintenance, that will be observed; but the right to maintenance and support, when given in general terms, will cease with the marriage or forisfiliation of a child. *Knapp v. Noyes*, Amb. 662; *Gardner v. Barber*, 18 Jur. 508; and *Wilkins v. Jodrell*, 13 Chy. D. 564, considered and commented on. *Ib.*

A widow ceases to be entitled to support and maintenance upon marrying again:—Quere as to her rights if she should again become a widow without means of support. *Ib.*

The personal estate turned out insufficient to pay the legacies of which the one of \$2,000 was first payable out of those remaining unpaid:—Held, if the \$2,000 legacy to the son absorbed all the personal estate the daughters would get none of it as their legacies were charged on the land, and that the \$2,000 legacy and the legacy for maintenance must abate proportionally, and that there was no ground for marshalling. *Ib.*

See *Cowan v. Besserer et al.*, 5 O. R. 624, p. 754; *Young v. Purvis*, 11 O. R. 597, p. 730.

#### 14. Power of Appointment.

A testator devised certain lands to his wife, "to be held and enjoyed by her so long as she shall live and remain unmarried. After my decease and after her decease, or in the event of her marrying again, then from and after such second marriage, I will and devise the same unto my son, who shall be named by my said wife,

money as might be sufficient, and educate his wife in a manner in life, and for that purpose to collect money and to maintain his family directed his sons to pay to receive their lands, but they were not to the family were main.

The trustees were to the daughters as they at there was not sufficient, the balance was to estate: the real estate between the sons when the, and then the trustees, \$2,000. The balance of to be divided between the charged with his \$2,000

divided again:—Held, that entitled to maintenance majorities:—Held, also, led to maintenance un- \$150 came into opera- on the sons respectively. Although the mainten- the personal estate.

were assigned for that of the real estate were tained twenty-five, the ing disposed of descen- . e., the children, and ir maintenance if the ficient. *Cook v. Noble*.

himself specified the time- nance, that will be ob- maintenance and sup- eral terms, will cease- sification of a child- 32; *Gardner v. Barber*, ns v. Jodrell, 13 Chy- mmented on. *Id.*

entitled to support and ing again:—*Quere* as again become a widow . *Id.*

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al., 5 O. R. 624, p. 754; . 597, p. 730.

ppointment.

tain lands to his wife, by her so long as she married. After my de- ce, or in the event of from and after such d devise the same un- amed by my said wife,

by deed, under her hand and seal, and to his heirs and assigns forever." The widow married again, without having executed the power:—Held, that there being no specific limitation as to time, the whole period of the life of the donee was allowed for the execution of the power, and it did not cease upon her second marriage:—*Quere*, whether she could exercise it till after her second marriage. *Cowan v. Besserer, et al.*, 5 O. R. 624.—Proudfoot.

See *Sweet et al. v. Platt et al.*, 10 O. R. \*229, p. 734; *Smith v. McLellan*, 11 O. R. 191, p. 308; *Re Ontario Loan and Savings Co. and Powers*, 12 O. R. 582, p. 735.

Power to appoint trustees. See *McLachlin et al. v. Osborne et al.*—*Magee v. Osborne et al.*, 7 O. R. 297, p. 689.

#### 16. Conditions and Limitations.

See *Re Casner*, 6 O. R. 282, p. 731; *Re Windstanley and Southerly thirty-five feet of lot 11, west side of Jarvis St., Toronto*, 6 O. R. 315, p. 731; *Clarke et al. v. Darraugh et al.*, 5 O. R. 140, p. 735.

See also, Sub-head III. 11, (e), p. 744.

#### 17. Lapsed Devises or Bequests.

R. B. by his will devised his property to executors upon trust as follows: "Fifthly, in trust to pay to each of my two surviving children F. B. and M. A. B. the sum of \$1,000," and the residue after the payment of his debts, &c., and the said legacies and an allowance to his executors, to his four sisters. F. B. and M. A. B. were illegitimate children, and M. A. B. married and died during the lifetime of the testator leaving children surviving. In a suit for administration and construction of the will it was:—Held, that the words "child or other issue" in R. S. O. c. 106, s. 25, mean legitimate child or other legitimate issue and do not apply to an illegitimate child, and that the legacy to M. A. B. lapsed. *Hargraff et al. v. Keevan et al.*, 10 O. R. 272.—Ferguson.

H. made his will on October 10th, devising land to his son J., without words of limitation, and added a codicil on February 23rd, 1870, by which he confirmed the will save as changed by the codicil. J., the devisee, died February 17th, 1874, and H., the testator, died December 15th, 1879:—Held, that the will was made and republished by the codicil prior to J. vary 1st, 1874, the sections subsequent to s. 7 of R. S. O. c. 106, and among them s. 35, did not apply, and that under the former law the devise to J. lapsed. *Zumstein v. Hedrick et al.*, 8 O. R. 338.—Proudfoot.

In one clause of his will, a testator devised certain lands to his son A. S. M. "as soon as he attains the age of 21 years for and during the term of his natural life," and after the determination of that estate to the sons of the body of A. S. M. in tail male, as they should be in point of birth, and for want of such issue, then to the daughters of the body of A. S. M. and the heirs of the body of such daughters, which daughters and their issue were to take as tenants in common, and for default of such issue, the lands were to be divided among the testator's other sons, or the

heirs of their respective bodies who at the death of A. S. M. should be entitled to any part of the lands devised in tail in the will to hold to his respective other sons, and in default of such sons and of their issue at the death of A. S. M. then to the right heirs of A. S. M. forever. A. S. M. predeceased the testator:—Held, that thereupon the devise to A. S. M. lapsed, the whole scope of the clause intending that A. S. M. should survive the testator. *Riddell v. McIntosh et al.*, 9 O. R. 606.—Boyd.

See *Becher v. Hoare et al.*, 8 O. R. 328, p. 752.

#### 18. Void Devises and Bequests.

##### (a) To Religious and Charitable Uses.

A testator devised land to K., in trust to sell and pay the proceeds "to the Sisters of Charity of Hamilton, to be their property absolutely." There were also bequests to K. of money, to pay the same to the St. Mary's Hospital, an Orphan Asylum and a Convent. No evidence was given to shew who the Sisters of Charity were. In an action to recover the land brought by the heirs at law of the testator:—Held, that a corporate capacity could not be imputed to the Sisters of Charity, in order to destroy the gift to them under the Statutes of Mortmain, and that the devise, might be supported as a gift to the individuals who, at the time of the testator's death, filled the character of Sisters of Charity. *Walker v. Murray*, 5 O. R. 638.—Osler.

R. P. L., by his will directed his executors "by and out of the moneys which shall be received by them from the P. B. & M. Co., for or on account of the debt or sum of \$35,000, owing and secured by mortgage by that company to me at the time of my decease, and of the interest thereof which shall accrue after my decease, in the first place to pay the sum of \$1,500, part thereof to the bishop for the time being of Algoma in Canada, to be invested by him in or upon any of the investments hereinafter authorized with power for the bishop of Algoma aforesaid for the time being from time to time to vary and transmute the investments thereof at his discretion for any other or others of the kind prescribed and the income of such investment to be applied in and for the education and qualifying of John Eskinah an Algoma Indian at present of the Shingwauk Home, Sault Ste. Marie, Algoma, aforesaid, (heretofore supported by me,) as and for a missionary in the diocese of Algoma, aforesaid, for and during, and until such time as the bishop of the said diocese for the time being shall consider sufficiently qualified for such purpose, and upon and after the completion of such education and qualifying to apply such income as aforesaid forever thereafter from time to time in and for the education and qualifying of some other person to be nominated by such bishop for the time being for a like purpose, and during such time as he shall think proper; but for which applications the trustees and executors shall not be responsible. And after payment of the aforesaid legacy I give and bequeath the following legacies to be paid out of the said fund or moneys, namely:—To the treasurer for the time being of the Algoma missions in British America the sum of \$15,000 of Canadian currency for the benefit of those missions. To the treasurer for the time being of the Huron missions in British America the sum



of \$1,500 of the aforesaid currency for the benefit of those missions. And to the treasurer for the time being of the Ontario missions in British America, the sum of \$2,500 of the aforesaid currency for the benefit of those missions."—Held, that the bequest to the bishop of Algoma for the benefit and education of John Eskinah and others was intended to set apart a fund which was to have perpetual continuance and in which no individual was to have a personal right, and following *Gillam v. Taylor*, L. R. 16 Eq. 584, such bequest was void:—Held, also, that the bequest to the treasurer for the Algoma missions was a charitable gift and must fail, because no person or body was empowered to hold it as against the Statute of Mortmain, 9 Geo. II. c. 36, inasmuch as there was no incorporation of Algoma for ecclesiastical or missionary purposes with such powers:—Held, also, that the bequests to the treasurers of the Huron and Ontario missions respectively were intended for the missions sustained by the incorporated synods of the dioceses of Huron and Ontario, and that by virtue of their Acts of Incorporation both these dioceses were enabled to hold lands, &c., in Mortmain, and that such bequests therefore did not fail either for uncertainty or because they could not be held by the defendants the synods respectively. *Labatt v. Campbell*, 7 O. R. 250.—Boyd.

H. S., by his will, bequeathed certain pure and impure personalty to the London City Mission, a charitable organization, and died in 1865. In 1866 A. S., his heiress and next of kin, sent a signed writing to the executor of the will, in which, after reciting that doubts might arise whether the impure personalty passed to the executor in trust for the charity, she declared her acquiescence in what she said she knew had been the testator's intention, viz., that the whole of the personalty, pure and impure, should be treated by the executor as so passing to him, and renounced her rights thereto, and requested the executor to treat it all as so passing. In May, 1870, A. S. made a will devising and bequeathing all her real and personal property on certain trusts. In July, 1870, she informed the executor of H. S. that she had changed her intentions as to the matter referred to in the writing of 1866, above mentioned, and she forwarded another will, dated July, 1870, in which she bequeathed all the property she had as heiress and next of kin to H. S. to J. R., and appointed the same person her executor as was executor of the will of H. S. J. R. died before A. S. In 1869, and in March, 1870, A. S. had written letters to the secretary of the London City Mission, in which she had expressed her intention of carrying into effect the intentions of H. S., as expressed in his will. A. S. died in 1877, and probate of her first will of May, 1870, was granted to the executors named in it:—Held, that the impure personalty could not pass by the will to the London City Mission, and the writing of 1866 and the letters to the London City Mission did not amount to such an assignment of it as would pass it to the charity inasmuch as the requirements of the Mortmain Acts were not complied with: that a gift by will of property that failed to take effect by reason of the Mortmain Acts, could not be aided or set up by the party entitled to the property by anything less than what would be required to constitute a good gift by such party of the same property to

the party intended to be benefited by the gift in the will. There can be no marshalling of assets in favour of a charity. As to the two wills of A. S., the bequest to J. R. by the second will lapsed by reason of her death before that of H. S., and the subject of it fell into the estate of A. S., so as to pass under the former will. *Becher v. Hoare et al.*, 8 O. R. 323.—Ferguson.

G. W. by his will bequeathed \$1,000 to "The Protestant Orphans' Home for Boys in Toronto." The evidence shewed that there were two institutions, either of which might have been intended by the testator:—Held, that the legacy should be divided between them. G. W. also bequeathed to "The Benevolent Institutions and Charities of Owen Sound, \$1,000, to be distributed as my executors shall deem meet":—Held that the testator intended a bequest to the Municipal Corporation of Owen Sound, to be distributed as the executors should direct. *Williams v. Roy et al.*, 9 O. R. 534.—Boyd.

J. M. died on August 9th, 1884, having made his will three days before, in which, after giving certain legacies, he provided as follows: "I give and devise all my real and personal estate whatsoever and wheresoever, with the above exceptions, to the Lutheran Church for the purpose of building a college in Canada, and not elsewhere, and in his name." The Lutheran Church was not incorporated and held no lands, but was composed of a number of congregations in different parts of the province. The lands upon which the various churches belonging thereto were erected, were vested in trustees for the benefit of the congregations, and some of these lands were suitable as building sites for a college:—Held, that the devise of the realty and all personalty savouring of the realty was void:—Held, also following *Giblett v. Hobson*, 3 Myl. & K. 517, that the bequest of the pure personalty was also void; that a bequest of money or other personalty to any charitable institution to build or erect buildings, taken by itself, is within the Statute of Mortmain; and that the onus of showing that the intention of a testator was restrained within lawful limits is upon the party seeking to take the bequest out of the statute; and that the intention must appear absolutely certain and clear; and that land already in Mortmain must be indicated or the future acquisition of building land, otherwise than by means of the legacy, must plainly be contemplated, or the words of the will must expressly exclude the application of the money given in the acquisition of land, which was not done in this case. *Murray et al. v. Malloy et al.*, 10 O. R. 46.—Ferguson.

Held, that, as it appeared that the only consideration for the testator's liberality to J. M. was that he supposed her to be "my beloved wife Julie Morin," whilst at that time J. M. was, in fact, the lawful wife of another man, the universal bequest to J. M. was void; through error and false cause. *Russell v. Lefrancois*, 8 S. C. R. 335.

#### (b) Other Cases.

Quære, whether since *Ryan v. Devereux*, 16 Q. B. 100, a bequest to one of the witnesses to a will would be held to be invalid. *In re Munsie*,



benefited by the gift no marshalling of assets. As to the two wills

R. by the second will at before that of H. fell into the estate of the former will. *P. R. 328.*—Ferguson.

thath \$1,000 to "The for Boys in Toronto."

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ing sites for a college; the realty and all per- ty was void:—Held, Hobson, 3 Myl. & K.

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Cases.

Ryan v. Devereux, 16 e of the witnesses to a valid. *In re Munsie,*

10 P. R. 98. *Hodgins, Master in Ordinary.* But see *Munsie v. Lindsay et al.*, 11 O. R. 520. See also *Morrison v. Morrison et al.*, 9 O. R., at p. 225.

Where a will creates a life estate in chattels the executor is discharged when he hands over such chattels to the tenant for life. The tenant for life, and not the executor, then becomes liable for them to the person entitled in remainder. *Re Munsie*, 10 P. R. 98.—*Hodgins, Master in Ordinary.*

See *Re Fox and the South half of Lot No. One in the Tenth Concession of Downie*, 8 O. R. 489, p. 741.

#### IV. WILL BY MARRIED WOMAN.

In a so-called will, executed a few days before her death, G. L.'s wife assumed to devise the land in question to L. At the date of this will G. was only eighteen years of age:—Held, that the will was invalid. *C. S. U. C. c. 73, s. 16 (R. S. O. c. 106, s. 6)* only removes the disability of coverture in respect to wills, not of infancy. *Re Murray Canal—Lawson v. Powers*, 6 O. R. 685.—Boyd.

See *Smith v. Smith*, 5 O. R. 690, p. 215.

#### V. WILL BY INFANT.

See *Re Murray Canal—Lawson v. Powers*, 6 O. R. 685, *supra*.

#### VI. MISCELLANEOUS CASES.

Held, also, that although testamentary expenses, which include the costs of a suit for construction and administration, are usually payable out of the general personal estate, yet here the provision that the testamentary expenses were to be paid out of the first money which should come into his executors' hands, shewed the testator contemplated the payment of such expenses out of a mixed fund of pure and impure personalty derived from the conversion of his real estate; and there being nothing else in the will to affect or alter this, the costs of this action must be borne ratably by the pure and impure personalty, and the proceeds of land directed to be sold. *Ball et al. v. The Rector and Churchwardens of the Church of the Ascension et al.*, 5 O. R. 336.

The testator also devised certain lands to his widow, to have and to hold the same for the following uses: "To sell and dispose of the same as she should think proper and right, and the moneys thereupon coming and arising to use and apply for the payment of my just debts, and for the maintenance of herself and my minor children, and the education of such children as she may see to be fit and necessary," and he authorized his wife to convey the said lands in fee simple to the purchasers and directed that in the event of any of the said lands remaining unsold at the time when his youngest surviving child should attain 21, then the above devises and powers should cease, and the lands be subject to the trusts of his will previously declared, under which the lands were ultimately to be divided among his children. The testator was twice married:—Held, that the children and grandchildren of the testator's

first marriage had no right to demand an account of the lands sold under the above provisions, or investigate the amount used for maintenance. Semble, that the widow took absolutely the balance of the proceeds of sale not required for debts. In the case of separate devises, though the wife may be barred of her dower in one, she is not therefore barred of her dower in the others. *Cowan v. Besserer*, 5 O. R. 624.

The testator, by his will made in June 1880, gave the bulk of his property to the plaintiff, his sister, with whom, in the autumn before his death, he had quarrelled, and it did not appear that she saw him again before he died. The defendant, another sister, claimed under a second will made an hour or two before the testator's death. The evidence shewed that the testator was a very determined man, and not easily influenced; that he was suffering from excessive indulgence in drink; that he latterly spoke in very bitter and offensive terms of the defendant, and had frequently said that she should have nothing; that he had frequently, and as late as a few days before his death, stated that if he died everything was arranged and that the plaintiff would get his property. Shortly before his death the defendant had him brought to her house. On the night of his death the physician in attendance told defendant that if anything was to be settled it should be done at once. A solicitor was sent for to draw a will. The defendant instructed him before he saw the testator, and upon her instructions the will was drawn, which gave the bulk of the property to the defendant, and a bequest of \$1,000 to the plaintiff. This the solicitor read over to the testator and asked him if he approved of it. He made a sign of dissent. The defendant urged the testator to give the plaintiff the \$1,000, but (as the defendant stated,) he said \$10 was enough for the plaintiff. The solicitor thereupon went away leaving the will with the defendant, and during his absence it was signed. The evidence of various witnesses for the defence was conflicting as to the incidents which happened during this time and until the testator's decease; and while they all spoke of the testator's unwillingness to give the plaintiff more than \$10, there was no evidence, other than that of the defendant, of his desire to give her the bulk of his property or to make any disposition of it:—Held, reversing the judgment of Proudfoot, J., that the second will could not be established on the uncorroborated evidence of the defendant, and the prior will was declared to be the testator's last will. *Hogg v. Maguire*, 11 A. R. 507.

A matter involving the proper construction of a will cannot be brought up on petition under *R. S. O. c. 107, s. 35.* *Barclay et al. v. Zwitz et al.*, 8 O. R. 665.—Boyd.

Right to jury in actions to establish wills. See *Re Lewis—Jackson v. Scott*, 11 P. R. 107, p. 682.

#### WINDING-UP ACTS.

See CORPORATIONS.

#### WITNESS.

See EVIDENCE—COSTS—WILL.

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II. IN DEED—See DEEDS—USES (STATUTE OF.)

III. IN WILLS—See WILL.

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"Any general meeting of the company duly called for the purpose."—See *The Austin Mining Co. (Limited) v. Gemmell*, 10 O. R. 696, p. 113.

"Any person or persons who shall voluntarily come upon the said market place for the purpose of selling."—See *Regina v. Reed*, 11 O. R. 242, p. 385.

"As soon after the loss as possible."—See *Cameron et al. v. The Canada Fire and Marine Ins. Co.*, 6 O. R. 392, p. 334.

"Assets in Ontario which may be rendered liable to judgment."—See *Purvis v. Slater*, 11 P. R. 507, p. 25.

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"Cause of action."—See *Garland v. Omnium Securities Co.*, 10 P. R. 135, p. 198.

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"Come upon the market place for the purpose of selling."—See *Regina v. Reed*, 11 O. R. 242, p. 385.

"Coming to accept."—See *McFarren v. Johnson*, 6 O. R. 161, p. 89.

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"Debtor in close custody."—See *Hay v. Patterson*, 11 P. R. 114, p. 71.

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"Voluntary."—See *Whitney v. Toby et al.*, 6 O. R. 54, p. 283.

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"Warrant and defend."—See *Green et al. v. Watson*, 10 A. R. 113 p. 515.

"Was done in pursuance of the authority of this Act and the special Act."—See *May v. Ontario and Quebec R. W. Co.*, 10 O. R. 70, p. 592.

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## WORK AND LABOUR.

### I. REMUNERATION.

1. Subject to Certificate or Decision of third person, 760.
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### II. MISCELLANEOUS CASES, 762.

### I. REMUNERATION.

#### 1. Subject to Certificate or Decision of third person.

The plaintiffs entered into a contract with the defendants to construct a cedar block roadway, &c., according to plans and specifications, and to the direction and satisfaction of the city engineer, &c. Payment was to be made monthly at the rates mentioned in the tender, during the progress of the work, upon the engineer's certificate and that of the chairman of the committee, and until the granting thereof no money was to become due or payable. A drawback of 15 per cent. was to be retained by the corporation until after six months from the time of the final certificate, shewing the satisfactory completion of the work. By the by-law no contractor could demand payment until he should present to the treasurer a certificate from the engineer, &c. stating he had examined, measured and computed the work, and that the same was completed, or that the payment was due on such work, and also stating what the work was on which such money was due; also that every account before being paid should be certified by the engineer, and by the committee under whose authority the work was done; and the treasurer should not pay such accounts unless furnished with the two certificates:—Held, that the required certificate must be in writing. By the conditions found with the specifications the engineer was the sole judge of the quantity and quality of the work done, and his decision was to be final and conclusive as against the contractor: that monthly payments up to 85 per cent. of the work done should be made, &c., on the measurement of the engineer, such certificates to be binding only as progress certificates, and in no way to affect the final certificate, which should only be given on the whole work being completed and measured up, and at the expiration of six months when a certificate for the balance should be issued by the engineer. Part of the work required to be done by the plaintiffs was the raising and removing of the street railway ties, &c., and replacing same after the grading and ballasting had been completed. The plaintiffs did not replace the ties, &c., as the street railway company elected to do the work themselves, but the plaintiffs sent in their accounts charging therefor as if they had done the work. As to a portion of the work there was no certificate by the engineer that the work was done or that the price was payable therefor; and as to the other portion the acting engineer wrote under the account sent in "allowed one-third of above \$521.66;" and then under this was written "certified for the sum of \$521.66." On the back of the account the engineer subsequently certified that he had examined the account, and that plaintiffs were entitled to recover the sum of \$521.66, which was paid to the plaintiffs. Under this certificate the plaintiffs claimed that they were entitled to recover for the whole work done, as this was the effect of the certificate:—Held, that as to the first-named portion there could be no recovery by reason of the absence of a certificate; and as to the other portion the certificate did not shew that the work was done to the engineer's satisfaction or was completed, or that the payment demanded was due; but at most that one-third of the work was done, and which had been paid for; and therefore nothing was shewn to be due to the plaintiffs. *Ardagh*

ATION.

decision of third person.  
 o a contract with the  
 edar block roadway,  
 d specifications, and  
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 s to be made monthly  
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 o do the work them-  
 ent in their accounts  
 y had done the work.  
 there was no certifi-  
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 e therefor; and as to  
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 ed one-third of above  
 r this was written  
 f \$521.66." On the  
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 ned the account, and  
 to recover the sum of  
 the plaintiffs. Under  
 s claimed that they  
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 of the certificate:—  
 named portion there  
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 e other portion the  
 t the work was done  
 n or was completed,  
 ded was due; but at  
 work was done, and  
 and therefore nothing  
 plaintiffs. *Ardagh*

*et al. v. The Corporation of the City of Toronto*,  
 12 O. R. 236—C. P. D.

## 2. Penalty for Non-performance.

One M., by a written contract, agreed with the defendant for the erection of a dwelling house in two months from date, and if M. neglected to build the house defendant was to be at liberty to purchase material and employ workmen to finish it, and deduct the cost of the material, &c., out of the price. The plaintiff agreed to supply M. with lumber to be used in the building, and M., after a portion of the lumber had been placed in the building, gave plaintiff an order on defendant for the sum of \$341.46, expressed to be "for lumber used in your house one month after the building is finished," which the defendant accepted. M. failed to complete the building, and the defendant employed a third party to do so in accordance with the terms of the agreement:—Held, per Hagarty, C. J. O., and Morrison, J. A., (affirming the judgment of the County Court) that the defendant was liable to pay the plaintiff, notwithstanding M. did not complete the building. Per Burton, J. A. The defendant was entitled to deduct whatever was properly expended in completing the building under the contract, and the balance only remaining in his hands would be applicable to the pay-

ment of the order, but this balance according to the evidence was sufficient. *Garner v. Hayes*, 10 A. R. 24.

*Chatterton v. Crothers*, 9 O. R. 683, p. 525.

## II. MISCELLANEOUS CASES.

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See *Spears v. Walker*, 11 S. C. R. 113, p. 93; *McLennan v. Winston et al.*, 12 O. R. 431; pp. 97, 98.

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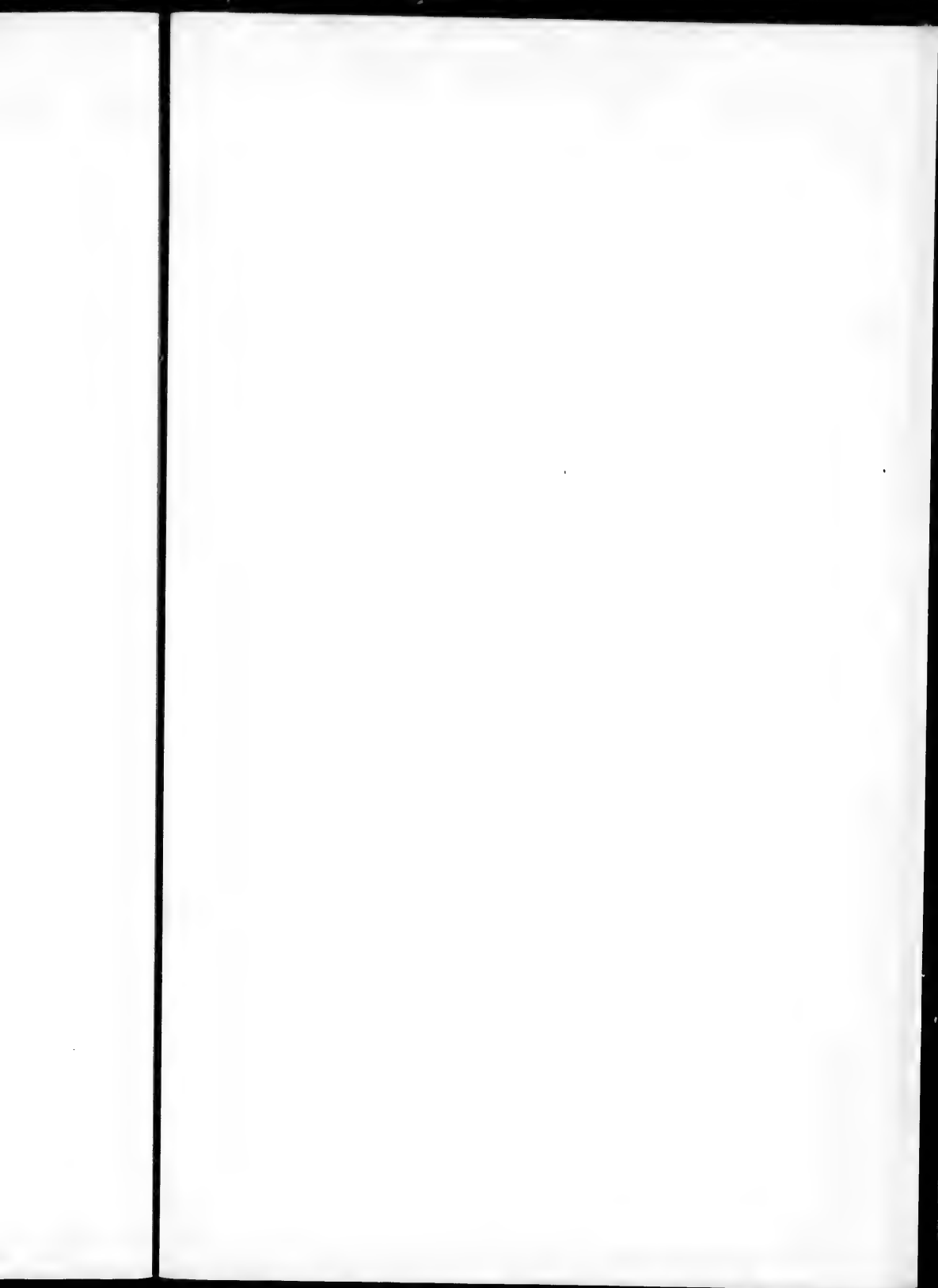
II. OTHER WRITS — See THEIR SEVERAL TITLES.

## WRONGFUL DISMISSAL.

See MASTER AND SERVANT.

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# APPENDIX

CONTAINING A DIGEST OF CASES REPORTED IN VOLS. 1, 2 AND 3,  
OF CARTWRIGHT'S CASES ON THE BRITISH NORTH  
AMERICA ACT, 1867.

Compiled by John R. Cartwright, Esq.

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inice to assert the rights of the Crown,  
and of those who are under its pro-  
tection. The Attorney-General of  
the Province, and not the Attorney-  
General of the Dominion, is the pro-  
per party to file an information where  
the complaint is not of an injury to  
property vested in the Crown as rep-  
resenting the Government of the Do-  
minion, but of a violation of the  
rights of the public of the Province,  
even though such rights are created  
by an Act of the Parliament of the  
Dominion. The Attorney-General  
of the Province is the proper person  
to file an information in respect of a  
nuisance caused by interference with  
a railway. Though the power of  
making criminal laws is vested in the  
Dominion Parliament, the Attorney-  
General of the Province is the proper  
officer to enforce those laws by prose-  
cution in the Queen's Courts of Jus-  
tice in the Province.—*Attorney-Gen-  
eral v. Niagara Falls International  
Bridge Co.*—Chy., Ont. . . . . i. 813

— 2. An Act of the Dominion Par-  
liament incorporating a company for  
the purpose of constructing a bridge  
across the Niagara River from Can-  
ada to the United States, directed  
that the bridge should be "as well  
for the passage of persons on foot,  
and in carriages, and otherwise, as  
for the passage of railway trains." The  
bridge was completed for rail-  
way purposes only, and the time  
limited by the charter for completing  
the work having elapsed, an informa-  
tion was filed in the name of the  
Attorney-General of Ontario, seek-

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ing to enforce the terms of the charter, or for the removal of the bridge as a nuisance: <i>Held</i> by the Court of Appeal, reversing the decision of Spragge, C., that the bridge as constructed not being a public nuisance the Attorney-General of Ontario was not the proper officer to file the information.— <i>Attorney-General v. International Bridge Co.</i> —C. A., Ont. . . . ii. 559	
—Proceedings to set aside Patent. . . . iii. 341	

#### SEC PATENT OF INVENTION.

<b>BANKRUPTCY AND INSOLVENCY.</b> —The Act of the Legislature of Quebec (33 <i>Vict.</i> c. 58) for the relief of the appellant society then (as appeared on the face of the Act) in a state of extreme financial embarrassment is within the legislative capacity of that Legislature. The Act was held to relate to a matter of a "merely local or private nature in the Province," which by the 92nd section of the B. N. A. Act, 1867, is assigned to the exclusive competency of the Provincial Legislature; and not to fall within the category of bankruptcy and insolvency, or any other class of subjects by the 91st section of the B. N. A. Act reserved for the exclusive legislative authority of the Parliament of Canada.— <i>L'Union St. Jacques de Montreal v. Belisle</i> .—P. C. . . . i. 63	
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—2. The B. N. A. Act, 1867, s. 91, in assigning to the Dominion Parliament the subjects of bankruptcy and insolvency, conferred on it legislative power to interfere with property, civil rights and procedure within the Provinces, so far as these might be affected by a general law relating to those subjects; consequently the Dominion Enactment, 40 <i>Vict.</i> c. 41, s. 28, providing that the judgment of the Court of Appeal in matters of insolvency should be final, <i>i. e.</i> , not subject to the appeal as of right to Her Majesty in Council, allowed by the Lower Canada Civil Procedure Code, Art. 1178, is within the competence of the Dominion Parliament and does not infringe the exclusive powers given to the Provincial Legislatures by section 92 of the Imperial Statute; nor does it infringe the Queen's prerogative, for it only limits the right of appeal as given by the Code. The section according to the true construction of the word "final" therein, excludes appeals to Her Majesty, but contains no words which purport to derogate from the prerogative of the Queen to allow such appeals as an act of grace. It, therefore, does not interfere with the prerogative of the Crown; and, quare, what powers may be possessed by the Parliament of Canada so to do. <i>Cuvillier v. Aylwin</i> (2 Knapp's P. C. C. 72) reviewed.— <i>Cushing v. Dupuy</i> .—P. C. . . . i. 252	
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—3. Section 50 of the Insolvent Act of 1869, which provided that claims by and against assignees in insolvency might be disposed of by the Judge of	
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the County Court or by the County Court on petition, and not by any suit, attachment, opposition, seizure or other proceeding whatever, was held not to be beyond the power of the Dominion Parliament, because the right to legislate on the subject of bankruptcy and insolvency belongs exclusively to that Parliament, and because at the passing of the B. N. A. Act there was a system of proceeding in insolvency in force in the former Provinces of Upper and Lower Canada very similar to the one established by the Act of 1869.— <i>Cronbie v. Jackson</i> .—Q. B., Ont. . . i. 685	

—4. An Act of the Dominion assuming to provide for the liquidation of all building societies in the Province of Quebec, whether solvent or not was held to be beyond the competence of the Dominion Parliament.— <i>McLanaghan v. The St. Ann's Mutual Building Society</i> .—Q. B., Quebec. . . . ii. 237	
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—5. An official assignee, or his agent, acting under an Insolvent Act of the Parliament of Canada, can sell by auction the goods of a bankrupt without taking out a license therefor; and this right cannot be restricted by a Provincial enactment. The Quebec License Act, 1870, in so far as it seeks to impose a tax on the sum realized from the sale of an insolvent's effects when made under the Insolvent Act of 1869, 32-33 <i>Vict.</i> c. 16, and to restrain the powers of assignees in putting that Act in operation is invalid.— <i>Côté v. Watson</i> .—Superior Ct., Quebec . . . ii. 343	
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—6. Section 59 of the Dominion Insolvent Act of 1869 provided that no lien or privilege upon the property of an insolvent should be created for a judgment debt by the issue or delivery to the sheriff of an execution, or by levying upon or seizing thereunder the effects or estate of an insolvent, if, before the payment over to the plaintiff of the moneys levied, the estate of the debtor had been assigned or placed in liquidation under that Act: <i>Held</i> to be within the competence of the Dominion Parliament.— <i>Kinney v. Dudman</i> .—Supreme Ct., N. S. . . . ii. 412	
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—7. An Act which provides for the examination of a debtor before a Judge, and which authorizes the Judge to grant the debtor a discharge from gaol or the limits as to the suit for which he was confined, on proof that he is unable to pay his debts, and that he has made no fraudulent transfer or undue preference, is an Insolvent Act which a Provincial Legislature has no power to pass, since the B. N. A. Act can, into force, and the assent of the Governor-General does not make such an enactment valid.— <i>The Queen v. Chandler</i> .—Supreme Ct., N. B. ii. 421	
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—8. The Legislature of New Brunswick, prior to the union, passed an Act extending the gaol limits. This Act was not to come into opera-	
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the County not by any tion, seizure whatever, was the power of ent, because the subject eney belongs liament, and of the B. N. stem of pro- force in the Upper and milar to the Act of 1869.— B., Ont. . i. 685

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tion until April 1st, 1868, and before that date, but after the union, it was repealed by a subsequent enactment: *Held*, that the subject of gaol limits does not so relate to insolvency as to make the repealing Act *ultra vires*.—*McAlmon v. Pine*.—Supreme Ct., N. B. . ii. 487

9. An Act of the Legislature of New Brunswick, abolishing imprisonment for debt, was held not to be *ultra vires*, as respects a party not shewn to be a trader or subject to the Dominion Insolvent Act.—*Armstrong v. McCutcheon*.—Supreme Ct., N. B. . ii. 494

10. An Act of the Legislature of New Brunswick providing that as against the assignee of the grantor under any law relating to insolvency, a bill of sale should only take effect from the time of the filing thereof, was held to be within the competence of the Legislature.—*In re De Veber*.—Supreme Ct., N. B. . ii. 552

11. The Dominion Parliament, by its Insolvent Act of 1875, enacted that any person who purchased goods on credit, knowing or believing himself to be unable to meet his engagements, and concealing the fact with intent to defraud, and who does not afterwards pay the debt, shall be held guilty of a fraud and be liable to imprisonment for two years unless the debt and costs are sooner paid, provided that in the suit for the recovery of the debt, the defendant is charged with the fraud and declared guilty of it by the judgment rendered in the suit. The plaintiff sued for goods sold and delivered to the defendants who afterwards became insolvent under the Act, and charged them with fraud in the terms of the Act: *Held* by a majority of the Judges of the Common Pleas, by two Judges of the Court of Appeal, and by three Judges of the Supreme Court (the other three giving no opinion on this point), that the enactment is within the competence of the Dominion Parliament.—*Peck v. Shields*.—C. A., Ont. . . . . iii. 266

12. An Act of the Nova Scotia Legislature for facilitating arrangements between Railway Companies and their creditors, provided that a company might propose a scheme of arrangement between the company and its creditors and file the same in Court and that thereafter the Court might, on application by the company, restrain any action against the company on such terms as the Court might think fit. The Act also provided that notice of filing the scheme should be published, and that thereafter no execution, attachment, or other process against the property of the company, should be available or be enforced without leave of the Court: *Held*, by Ritchie, J., that the above provisions related to bankruptcy and insolvency, and were in excess of the powers vested in a Provincial Legis-

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lature.—*Murdoch v. Windsor & Annapolis Railway Co.*—Supreme Ct., N. S. . . . . iii. 368

13. By An Act of the Legislature of Nova Scotia, provision was made for the winding-up of companies in general, where a resolution to that effect was passed by the company, or where the Court so ordered at the instance of a contributor, on its being made to appear that such order was just and equitable. The Act could be enforced although no debts were due by the company, but could not be called into operation by a creditor: *Held*, that the Act did not partake of the character of an insolvent law, and was within the legislative authority of a Provincial Legislature.—*In re The Wallace Huestis Grey Stone Co.*—Supreme Ct., N. S. . . . . iii. 374

14. Under the provisions of an Act of the Legislature of Nova Scotia, "to facilitate arrangements between Railway Companies and their creditors," the Windsor & Annapolis Railway Company proposed an arrangement whereby the so-called B debenture stock of the company then bearing interest at the rate of 6 per cent. was "abrogated and determined," and in lieu thereof the holders of said stock were to receive allotments of new stocks thereby created, bearing lower rates of interest, and otherwise differing from the stock for which they were substituted: *Held* (Weatherbe, J., dissenting) that so much of the Act as was necessary to the confirmation of the proposed scheme was within the legislative authority of the Legislature of Nova Scotia.—*Re Windsor & Annapolis Railway*.—Supreme Ct., N. S. . . iii. 387

Imprisonment of debtor . . ii. 527  
*See* CRIMINAL LAW, 7.

BANKS AND BANKING . . . i. 828

Transfer of Warehouse Receipts.  
*See* BILLS OF LADING, 2.

Taxation of Dominion Notes iii. 377  
*See* TAXATION, 5.

BILLS OF LADING AND WARE-

HOUSE RECEIPTS.—A Provincial Act to the effect that all rights of suit should pass to the consignee of goods named in any bill of lading, or to the endorsee thereof, to whom the property in the goods should be transferred by such consignment or endorsement, and that every such instrument representing goods to have been shipped should, in the hands of a consignee or endorsee for value, be conclusive evidence of shipment as against the person signing the instrument, was held not to be beyond the powers of the Provincial Legislature as being an interference with trade and commerce.—*Beard v. Steele*.—Q. B., Ont. . . . . i. 683

2. The Dominion Parliament has power to legislate with respect to property and civil rights, so far as necessary for the exercise of its jurisdiction over the subjects assigned to it by the B. N. A. Act. *Per Spragge, C.*: The Dominion Act, 34 Vict. c.

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5, s. 46, which authorizes the transfer of warehouse receipts to banks by direct endorsement, is within the powers assigned to the Dominion Parliament and is valid.— <i>Smith v. The Merchants' Bank</i> .—Chy., Ont. i.	828
BREWERS.—Licenses. . . . .	i. 414
See LICENSES, 1.	
CANADA.—Election Law. . . . .	ii. 332
See ELECTIONS TO PARLIAMENT.	
—Legislation respecting Statutes of old Parliament of Canada . . . .	i. 351
See LEGISLATURES OF ONTARIO AND QUEBEC.	
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CANADA TEMPERANCE ACT, 1878.—Power of Dominion Parliament to enact . . . . .	ii. 12
See INTOXICATING LIQUORS, 1.	
CIVIL RIGHTS.—Penalties . . . . .	ii. 297
See CRIMINAL LAW, 4.	
—Procedure . . . . .	ii. 492
See PROPERTY AND CIVIL RIGHTS, 2.	
—Property and Civil Rights. . . . .	
See PROPERTY AND CIVIL RIGHTS.	
COMMISSIONS.—Enquiry . . . . .	i. 789
See COUNTY COURT JUDGE.	
—Oyer and Terminer . . . . .	i. 722
See PREROGATIVE OF THE CROWN, 1.	
COMPANIES.—The Dominion Parliament has no power to incorporate an association for the purpose of buying, leasing, and selling landed property and buildings, the operations of a society for such purpose affecting exclusively property and civil rights within the Province where they are carried on; and therefore the Act 37 Vict. c. 103, incorporating the Colonial Building and Investment Association for such objects, was held to be <i>ultra vires</i> , though power was given by said Act to carry on operations throughout the Dominion. Monk, J., dissenting.— <i>Loranger v. The Colonial Building and Investment Association</i> .—Q. B., Quebec . . . . .	ii. 275
—2. Held that Canadian Act, 37 Vict. c. 103, which created a corporation with power to carry on certain definite kinds of business within the Dominion, was within the legislative competence of the Dominion Parliament. The fact that the corporation chose to confine the exercise of its powers to one Province, and to local and provincial objects, did not affect its status as a corporation, or operate to render its original incorporation illegal as <i>ultra vires</i> of the said Parliament: Held, further, that the corporation could not be prohibited gen-	

\* This decision was reversed by the Court of Appeal, 8 A. R. 15, on other grounds, but the decision of the Court of Appeal was subsequently reversed by the Supreme Court, 8 S. C. R. 512. In the Court of Appeal, Armour, J., held that the provision in question was invalid, while in the Supreme Court, Fournier, Henry and Taschereau, JJ., held the contrary.

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erally from acting as such within the Province; nor could it be restrained from doing specified acts in violation of the provincial law upon a petition not directed and adapted to that purpose. *Loranger v. The Colonial Building and Investment Association*, reversed.—*Colonial Building and Investment Association v. Attorney-General of Quebec*—P.C. . . . .

3. A company incorporated by a Provincial Legislature for the business of insurance, possesses the same capacity and franchises within the jurisdiction creating it as a company incorporated by the Imperial or Dominion Parliaments; and may enter into contracts outside the Province wherever such contracts are recognized by comity or otherwise. The term "Provincial objects" in the B. N. A. Act refers to local objects within a Province, in contradistinction to objects which are common to all Provinces in their collective or Dominion quality.—*Clarke v. Union Fire Insurance Co.*—Master's Office, Ont. . . . .

CONTRACTS.—Regulation. . . . .

See TRADE AND COMMERCE, 1.

COPYRIGHT.—*Right to legislate as to.*—The B. N. A. Act was not intended to curtail the paramount authority of the Imperial Parliament as respects any of the matters assigned by the Act to the exclusive jurisdiction of the Dominion Parliament, or of the Provincial Legislatures. All that the B. N. A. Act intended to effect by s. 91, sub-s. 23, as to copyright, was to place the right of dealing with colonial copyright within the Dominion under the exclusive control of the Parliament of Canada, as distinguished from the Provincial Legislatures, in the same way as the Act has transferred the power to deal with banking, bankruptcy and insolvency, and other specified subjects, from the Provincial Legislatures, and placed them under the exclusive jurisdiction and control of the Dominion. The Parliament of the Dominion has no greater power to deal with the subject of copyright than was possessed by Provincial Legislatures prior to Confederation. The Imperial Copyright Act, 5 & 6 Vict. c. 45, was in force in Canada at the time of Confederation, and is in force in Canada still. It is not affected by the Canadian Copyright Act of 1875, which Act is also in force.—*Smiles v. Bedford*—C. A., Ont. . . . .

COUNTY COURT JUDGE.—By the B. N. A. Act, 1867, sect. 96, the Governor-General is authorized to appoint the Judges of the County Courts, and the Provincial Legislature of Ontario had no power to pass an Act authorizing the removal of County Court Judges by the Lieutenant Governor for incapacity or misbehaviour and had not power to pass an Act abolishing the Court of Impeachment, which existed in Canada before the B. N. A. Act, for the trial



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of charges against County Court  
Judges. A County Court Judge may  
be removed by the Governor-General  
in Council under the Imperial Act,  
22 Geo. III. c. 75, but there is no  
power under that Act, or the Con.  
Stat. C. c. 13, or under the Common  
Law, to issue a commission for a pre-  
liminary enquiry under oath with  
respect to such charges.—*Re Squire*—  
Q. B., Ont. . . . i. 789

— Power to confer jurisdiction on.  
ii. 665; iii. 319

See JUDGES, 2, 3.

#### COURTS—

— Constitution of. . . ii. 602, 653, n.  
See CRIMINAL LAW, 8, 10.

— Power to constitute. . . i. 557  
See MARITIME COURT.

— Power to impose duties on. . . i. 158  
See PROVINCIAL COURTS.

CRIMINAL LAW.—An information  
under an Ontario Act for selling  
intoxicating liquors on Sunday was  
held to be so far a charge of a criminal  
character that the defendant  
could not be compelled to give evi-  
dence against himself.—*Regina v.*  
*Roddy* . . . i. 709

2. A Provincial Legislature  
cannot legislate with respect to  
offences of a criminal nature,  
except where such legislation is re-  
quired for the direct enforcement of  
a law of the Province made in rela-  
tion to a matter coming within its  
exclusive jurisdiction. In legislating  
in regard to a matter within Provin-  
cial jurisdiction, a Provincial Legis-  
lature has no power to enforce its law  
by provisions respecting the trial  
and punishment of offenders in re-  
spect of acts which would be criminal  
offences at common law. Section 57  
of the Liquor License Act of Ontario,  
R. S. O. c. 181, by which it was pro-  
vided that any person who, on any  
prosecution under that Act, tampered  
with a witness or induced or attempted  
to induce any such person to absent  
himself or to swear falsely, should be  
liable to a penalty of \$50, was there-  
fore held to be invalid.—*Regina v.*  
*Lawrence*—Q. B., Ont. . . i. 742

3. A Provincial Legislature has  
power to regulate procedure affecting  
penal laws which such Legislature has  
authority to enact. Breach of a Pro-  
vincial Statute is not a "crime"  
within the meaning of s. 91, sub-s. 27  
of the B.N.A. Act.—*Pope v. Griffith*.  
—Q. B., Quebec . . . ii. 291

4. A Provincial Legislature has  
power to regulate procedure affecting  
penal laws which such Legislature has  
authority to enact. A Statute of  
Quebec having provided that no pro-  
ceedings in civil matters before a Dis-  
trict Magistrate should be removed  
to any other Court by *certiorari* or  
otherwise, it was held that a pro-  
ceeding before a District Magistrate  
for the enforcement of penalties  
under the Licence Law of the Pro-  
vince was a civil proceeding within

this enactment, and that the right to  
*certiorari* was taken away.—*Ex parte*  
*Duncan*.—Superior Ct., Quebec. ii. 297

5. A Provincial Legislature has  
power to regulate procedure affecting  
penal laws which such Legislature  
has authority to enact.—*Page v.*  
*Griffith*.—Q. B., Quebec . . . ii. 308

6. A Provincial Legislature has  
power to regulate procedure affecting  
penal laws which such Legislature  
has authority to enact. An enact-  
ment of the Quebec Legislature pre-  
scribing the mode in which penalties  
for violations of a Statute of the  
Province (41 Vict. c. 3) are to be en-  
forced, was held to be valid.—*Cab-*  
*v. Chauveau*.—Superior Ct., Quebec,  
ii. 311

7. A Provincial Legislature has  
power to pass an enactment for the  
imprisonment of a person making  
default in payment of a sum due on  
a judgment in case (a) he has had  
since the date of the judgment or  
order, the means to pay the sum in  
respect of which he has made default  
and neglects or refuses to pay it, or  
in case (b) the liability was incurred  
by obtaining credit under false pre-  
tences, or by means of any other  
fraud, or by the commission of an act  
for which he might be proceeded  
against criminally. Weldon, J., dis-  
senting.—*Ex parte Ellis*.—Supreme  
Ct., N.B. . . . ii. 527

8. An Act of the Parliament of  
Canada provided in regard to appeals  
from summary convictions made by  
Justices of the Peace, that the parties  
might dispense with a jury if they  
thought fit, and submit themselves to  
the judgment of the Court appealed  
to without a jury: *Held*, that this  
enactment was not an interference  
with the "constitution" of the Court  
(in relation to which the Provincial  
Legislatures have exclusive juris-  
diction), but that it related to criminal  
law and procedure in criminal  
matters, and therefore was within  
the jurisdiction of the Dominion  
Parliament.—*Regina v. Bradshaw*.—  
Q. B., Ont. . . . ii. 602

9. By a Dominion Statute "for  
avoiding doubt," it was declared and  
enacted, "that every person qualified  
and summoned as a Grand Juror or  
as a Petit Juror in criminal cases,  
according to the laws which may be  
then in force in any Province of  
Canada, shall be and shall be held to  
be duly qualified to serve as such  
juror in that Province, whether such  
were laws passed before, or be passed  
after the coming into force of the  
B.N.A. Act, 1867, subject always to  
any provision in any Act of the  
Parliament of Canada, and in so far  
as such laws are not inconsistent with  
any such Act." Acts were afterwards  
passed by the Ontario Legislature  
changing the mode of selecting jurors  
in that Province. *Held*, that the Do-  
minion enactment was not an uncon-  
stitutional delegation of legislative  
authority and was not *ultra vires*, and

- that a selection of jurors made in the manner prescribed by the Ontario Acts was valid for the purpose of a criminal trial.—*Regina v. O'Rourke*.—*Q. B. D.*, Ont. . . . . ii. 644
- 10. The Acts relating to the attendance of grand and petit jurors at the County Courts (Courts of criminal jurisdiction over all crimes which are not capital), are within the powers of the Local Legislature, under the B.N.A. Act, 1867, sect. 92, as pertaining to the "Administration of Justice" and the "Constitution and organization of Provincial Courts," and do not belong to the Parliament of Canada, under sec. 91, as "Procedure in criminal matters."—*Regina v. Foley*.—*Supreme Ct.*, N.B. . . . . ii. 653, n
- 11. By the Act 32 and 33 Vict., c. 31, s. 78 (D), it is provided that penalties against Justices of the Peace for the non-return of convictions may be recovered in an action of debt by any person suing for the same in any Court of Record: *Held*, that this provision was within the competence of the Dominion Parliament, and that a Provincial enactment declaring that County Courts should have jurisdiction in such matters was thereby overborne.—*Regina v. Leed*.—*Supreme Ct.*, N.B. . . . . iii. 405
- Compromising Offence . . . i. 676
- See* LICENSES, 2.
- Prosecution of Offences . . . i. 813
- See* ATTORNEY-GENERAL, 1.
- Enforcing Temperance Act. ii. 606, 616
- See* TEMPERANCE ACT OF 1864, 3.
- DEBTOR.—*Power to provide for discharge of*.—By an Act in force in the Province of Nova Scotia at the Union, every debtor imprisoned under process from any Court was entitled to apply for and obtain his discharge. When this Act was passed there were no County Courts in Nova Scotia. In 1878 an Act of the Provincial Legislature was passed, making the above provisions applicable to persons imprisoned under process from the County Courts, and this enactment was held to be valid.—*Johnston v. Poyntz*.—*Supreme Ct.*, N.S. . . . ii. 416
- Discharge of . . . . . ii. 421
- See* BANKRUPTCY AND INSOLVENCY, 7.
- DELEGATION.—Subjects which in one aspect and for one purpose fall within sect. 92 of the B.N.A. Act, 1867, may in another aspect and for another purpose fall within sect. 91. *Russell v. The Queen* (7 App. Cas. 829) explained and approved. *Held*, that "The Liquor License Act of 1877," c. 181, Revised Statutes of Ontario, which, in respect of sects. 4 and 5, makes regulations in the nature of police or municipal regulations of a merely local character for the good government of taverns, etc., does not in respect of those sections interfere with the general regulation of trade or commerce, but comes within Nos. 8, 15 and 16 of sect. 92 of the Act of 1867, and is within the powers of the Provincial Legislature.—*Held*, further, that the Provincial Legislature had power by the said Act of 1867 to entrust to a Board of Commissioners authority to enact regulations of the above character, and thereby to create offences and annex penalties thereto. *Hodge v. The Queen*.—*P. C.* . . . iii. 114
- 2. Act No. 22 of 1869, of the Indian Legislature, which excludes the jurisdiction of the High Court within certain specified districts, is not inconsistent with the Indian High Courts Act (24 & 25 Vict. c. 104), or with the charter of the High Court, and is in its general scope within the legislative power of the Governor-General in Council. The 9th sect. of that Act which confers upon the Lieutenant-Governor of Bengal the power to determine whether the Act, or any part of it, shall be applied in a certain district, is conditional legislation, and not a delegation of legislative power. Where plenary powers of legislation exist to particular subjects, whether in an Imperial or in a Provincial Legislature, they may be well exercised, either absolutely or conditionally; in the latter case leaving to the discretion of some external authority the time and manner of carrying its legislation into effect, as also the area over which it is to extend. *Regina v. Burah*.—*P. C.* . . . iii. 409
- 3. A Colonial Legislature is not a delegate of the Imperial Legislature. It is restricted in the area of its powers, but within that area it is unrestricted. *Held*, that the Customs Regulation Act of 1879, s. 133, was within the plenary powers of legislation conferred upon the New South Wales Legislature by the Constitution Act, (Scheduled to 18 and 19 Vict., c. 54, ss. 1 and 45): *Held*, further, that duties levied by an Order in Council issued under sect. 133, are really levied by authority of the Legislature and not of the Executive. Also that under sect. 133 "the opinion of the collector," whether right or wrong, authorizes the action of the Governor.—*Powell v. Apollo Candle Co.*—*P. C.* . . . . . iii. 432
- Selection of Jurors, . . . . . ii. 644
- See* CRIMINAL LAW, 9.
- DENOMINATIONAL SCHOOLS.—A Provincial Legislature may legislate in regard to Separate Schools, provided that the rights or privileges with respect to denominational schools which any class of persons had by law in the Province at the time of Confederation are not prejudicially affected by such legislation. The B. N. A. Act provides by sub-s. 3 of s. 93 that "Where in any Province a system of separate or dissentient schools exists by law at the Union, or is thereafter established by the Legislature of the Province, an appeal shall lie to the Governor-General in Council from any Act or decision of any Provincial authority affecting any right or privilege of the Protestant or Roman Catholic min-

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ority of the Queen's subjects in relation to education;” *Held*, that this enactment gives an appeal in respect of those decisions alone which are legislative acts, or their equivalents, and not in respect of matters affecting merely the every-day detail of the working of a school. In election matters Separate Schools have the same right of appeal to a County Judge as Public Schools have. — *Separate School Trustees of Bellefleur v. Granger*—Chy., Ont. . . . i. 816

2. The provisions contained in sect. 93 of the B. N. A. Act, that nothing in any law made by a Province in relation to education “shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the Union,” protect those legal rights and privileges only which existed in each Province at the Union by virtue of positive legal enactment, and not privileges enjoyed under exceptional and accidental circumstances, and without legal right. At the Union the law with respect to the schools in the Province of New Brunswick was governed by the Parish School Act, under which no class of persons had any legal right or privilege with respect to denominational schools, and a subsequent Act, 34 Vict. c. 21, providing that the schools conducted thereunder should be non-sectarian, was therefore held to be valid. The constitutionality of the Act 34 Vict. c. 21, cannot be affected by any regulations of the Board of Education made under its authority; and sensible, if the Board of Education have made regulations which they ought not to have made, or have not made regulations which they should have made, the case falls within sub-s. 4 of sect. 93 of the B. N. A. Act. — *Ex parte Renaud*—Supreme Ct., N. B. . . . ii. 445

DIRECT TAXATION—Power to impose. . . . i. 95, 117

— *See* TAXATION, 1, 2.

DIVISION COURTS—Appointment of Judges. . . . ii. 665

— *See* JUDGES, 2.

DOMINION CONTROVERTED ELECTIONS ACT—Election Courts. . . . i. 158

— *See* PROVINCIAL COURTS.

DOMINION OFFICER—*Seizure of salary of.*—A Provincial Legislature has no power to declare liable to seizure the salaries of employees of the Federal Government. — *Evans v. Hudson*—Superior Ct., Quebec . . . ii. 546

— Taxation of income. . . . i. 592

— *See* TAXATION, 3.

DOMINION GOVERNMENT—*Jurisdiction and Property.*—Under the B. N. A. Act, 1867, s. 108, read in connection with the third schedule thereto, all railways belonging to the Province of Nova Scotia, including the railway in suit, passed to and became vested on the 1st of July, 1867, in the Dominion of Canada, but not

for any larger interest therein than at that date belonged to the Province. The railway in suit being, at the date of the statutory transfer, subject to an obligation on the part of the Provincial Government to enter into a traffic arrangement with the respondent company, the Dominion Government, in pursuance of that obligation, entered into a further agreement relating thereto, of the 22nd of September, 1871. *Quere*, whether it was *ultra vires* of the Dominion Parliament, by an enactment to that effect, to extinguish the rights of the respondent company under the said agreement. But held, that Dominion Act, 37 Vict. c. 16, did not, upon its true construction, purport so to do. And although it authorized a transfer of the railway to the appellant, it did not enact such transfer in derogation of the respondent's rights under the agreement of the 22nd of September, 1871, or otherwise. — *Western Counties Railway Co. v. Windsor and Annapolis Railway Co.*—P. C. . . . i. 397

2. *Held*, following the case of the Commissioners of the Cobourg Town Trust, 22 Grant 377, that the Commissioners of the Toronto Harbour were entitled to compensation for their services, and this whether the harbour belonged to the Dominion or the Provincial Government; as in the event of it being found to belong to the Dominion, it must be assumed that the Dominion Government intended the Commissioners to be subject to the law of the Province in which the trust was to be administered. — *Re Toronto Harbour Commissioners.*—Chy., Ont. . . . i. 825

— Public Harbours . . . ii. 147

— *See* HARBOURS.

— Statutes.

— *See* STATUTES.

DOMINION RAILWAY.—Power to transfer. . . . i. 233

— *See* PROVINCIAL LEGISLATURES, 2.

EDUCATION.—Denominational and Separate Schools . . . i. 816; ii. 445

— *See* DENOMINATIONAL SCHOOLS.

— Imperial Law. . . . i. 761

— *See* MEDICAL PRACTITIONER.

ELECTIONS TO PARLIAMENT.

— An Act of Canada passed before 1867 made void any contract referring to or arising out of a Parliamentary election, even for payment of lawful expenses; the Dominion Parliament passed an Act respecting Dominion elections, but not containing this or any like provision; *Held*, that this provision not having been repealed, was in force in Quebec as respects Dominion elections under ss. 41 and 129 of the B. N. A. Act, and that therefore a promissory note given for the expenses of a subsequent Dominion election was void. — *Willett v. Desrosiers.*—Superior Ct., Quebec . . . ii. 332

ESCHEAT.—Lands in the Province of Ontario escheated to the Crown for defect of heirs belong to the Province and not to the Dominion. At

- the date of passing the B. N. A. Act the revenue arising from all escheats to the Crown within the then Province of Canada was subject to the disposal and appropriation of the Canadian Legislature, and not of the Crown. Although sect. 102 of the Act vested in the Dominion the general public revenues, as then existing in the Provinces; yet by sect. 109 the casual revenue arising from lands escheated to the Crown after the Union was reserved to the Provinces—the words “lands, mines, minerals and royalties” therein including, according to their true construction, royalties in respect of lands such as escheats.—*Attorney-General v. McCrear*.—P. C. . . . . iii. 1
- EVIDENCE.**—Per Torrance, J. The Dominion Parliament can confer authority upon Courts and Judges in Canada, to make orders for the examination in the Dominion of any witness or party in relation to any civil or commercial matter pending before any British or Foreign tribunal; and the Dominion Act, 31 Vict. c. 76, which contains provisions for this purpose, was therefore held to be valid.—*Ex parte Smith*—Superior Ct., Quebec . . . . . ii. 330
- 2. The taking of evidence to be used in an action pending in a foreign tribunal is of extra Provincial pertinence, and does not fall within the exclusive legislative authority of the Provinces; the Dominion Act, 31 Vict. c. 76, providing for the taking of such evidence by Provincial Courts, was therefore held to be valid.—*Re Wetherell and Jones*—Ch. D., Ont. . . . . iii. 315
- In Criminal Matters. . . . . i. 709
- See CRIMINAL LAW, 1.
- EX POST FACTO LAW.**—Power to enact. . . . . ii. 678
- See TEMPERANCE ACT OF 1864, 4.
- EXTRADITION.**—The Imperial Extradition Act of 1870 is in force in Canada, notwithstanding that the B.N.A. Act, previously passed, gives to the Canadian Parliament jurisdiction to carry out obligations resulting from extradition treaties.—*Ex parte Worms*.—Q. B., Quebec. . . . . ii. 315
- FEDERAL COMPANY.**—Power to dissolve or transfer. . . . . i. 233
- See PROVINCIAL LEGISLATURES, 2.
- FINE AND IMPRISONMENT.**—Power of Provincial Legislature to authorize punishment of same offence by both modes.—*Ex parte Papin*.—Superior Ct., Quebec. . . . . ii. 320
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- Paige v. Griffith* ii. 324
- FINES AND PENALTIES.**—The Provincial Legislatures have the right to appropriate fines to municipal or other corporations.—*Bennett v. Pharmaceutical Association of Quebec* . . . . . ii. 250
- FIRE INSURANCE.**—Regulation of contracts . . . . . i. 265
- See TRADE AND COMMERCE, 1.
- Tax on Policies . . . . . PAGE, i. 117
- See TAXATION, 2.
- FIRE MARSHALS.**—Constitution of Court . . . . . i. 57
- See PROVINCIAL LEGISLATURES, 1.
- FISHERIES.**—The B. N. A. Act in assigning to the Parliament of Canada the right to legislate with respect to Sea Coast and Inland Fisheries, did not thereby give authority to deal with questions of property and civil rights, such as the ownership of the beds of the rivers, or of the fisheries, or the right of individuals therein. What the Act gave to Parliament was a right to legislate in regard to matters of national and general concern, such as forbidding fish to be taken at improper seasons, or in an improper manner, or with destructive instruments—such general laws as are for the benefit of the public at large as well as of the owner. Under the B.N.A. Act the exclusive rights of fishing vested in the proprietors of non-navigable rivers being in every sense of the word “property,” can be interfered with only by the Provincial Legislatures in exercise of the powers given to them to legislate respecting property and matters of a local or private nature. The rights of the Provincial Governments in respect of fisheries in non-navigable waters, the beds of which, not having been granted before Confederation, were then vested in the Provinces as part of the public domain, do not differ from the rights of private owners which had been acquired by grant from the Crown before that date, and a lease made by the Minister of Marine and Fisheries of a non-navigable portion of a river in the Province of New Brunswick, passing partly through granted and partly through ungranted lands, was therefore held to be void.—*The Queen v. Robertson*.—Supreme Ct., Can. . . . . ii. 65
- GAOL LIMITS.**—Power to alter. ii. 487
- See BANKRUPTCY AND INSOLVENCY, 8.
- GOVERNOR-GENERAL.**—Appeal under B. N. A. Act, sect. 93 . . . . . i. 816
- See DENOMINATIONAL SCHOOLS, 1.
- Authority as to issue of Commissions . . . . . i. 722, 789
- See PREROGATIVE, 1.
- COUNTY COURT JUDGE.
- HARBOURS.**—The “Public Harbours,” which by the B. N. A. Act are declared to be the property of the Dominion, include all harbours, together with the bed and soil thereof, which the public have the right to use, and are not limited to such as at the time of Confederation had been artificially constructed or improved at the public expense; and where a grant of part of the foreshore of a natural harbour used as such by the public, was made by the Provincial Government of Prince Edward Island subsequent to the admis-

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ii. 147	sion of that Province into the Union, the grant was held to be invalid.— <i>Holman v. Green</i> .—Supreme Ct., Can. . . . . ii. 147
ii. 576	HARD LABOUR.—A Provincial Legislature has power to enforce any of its laws by imposing hard labour as a punishment for the violation of them.— <i>Regina v. Frawley</i> .—C. A., Ont. . . . . ii. 576
iii. 144	—2. "Imprisonment" in No. 15 of section 92 of the Act of 1867 (B. N. A. Act) means imprisonment with or without hard labour.— <i>Hodge</i> <i>v. The Queen</i> .—P. C. . . . . iii. 144
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ii. 320, 322, 324	IMPRISONMENT.—Power to fine and imprison for same offence . . . . . ii. 320, 322, 324
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ii. 416, 421	IMPRISONMENT FOR DEBT.— Discharge of debtor . . . . . ii. 416, 421
7.	See BANKRUPTCY AND INSOLVENCY,
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ii. 527	—Power to impose, . . . . . ii. 527
	See CRIMINAL LAW, 7.
i. 831	INDIAN LANDS.—Those "lands reserved for the Indians," which by s. 91, sub-s. 24, of the B. N. A. Act, are placed under the exclusive legislative jurisdiction of the Parlia- ment of Canada, are those Indian lands only which have not been sur- rendered by the Indians, and have been reserved for their use and do not include lands to which the Indian title has been extinguished. The On- tario Legislature has power to tax against a vendee unpatented lands which the Indians have surrendered for the purpose of being sold; all un- patented lands, whether Indian lands or Crown lands, when once agreed to be sold, being upon the same footing as respects liability to municipal taxation.— <i>Church v. Pen-</i> <i>ton</i> .—C. P., Ont. . . . . i. 831
ii. 559	INFORMATION.—Nuisance i. 813; ii. 559
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i. 265	INSURANCE.—Regulation of con- tracts . . . . . i. 265
	See TRADE AND COMMERCE, 1.
i. 117	—Tax on Policies . . . . . i. 117
	See TAXATION, 2.
	INTEREST.—The general law having limited the rate of interest, in the absence of agreement between the parties, to six per cent., a Provincial Legislature has no power to authorize a municipal corporation to charge ten per cent. "increase" on overdue assessments, the so-called increase

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ii. 352	being but another name for interest. A municipal corporation was author- ized by an Act in force at the time of Confederation, to charge ten per cent. on overdue assessments; the Legisla- ture of Quebec passed an Act repeal- ing this enactment, and providing anew for a similar charge: <i>Held</i> , by Johnson, J., that the former enact- ment was effectually repealed, and that the new enactment as to increase was invalid.— <i>Ross v. Torrance</i> .—Su- perior Ct., Quebec . . . . . ii. 352
ii. 361	—2. The general law having pro- vided that on any contract or agree- ment any person may stipulate for any rate of interest or discount which may be agreed on, an Act of the Quebec Legislature, authorizing a company to pay such rate of interest for advances as might be agreed, and to make arrangements allowing such interest either by selling obligations bearing a lower rate of interest below par, or by issuing them at par, bear- ing the agreed rate of interest, was held to be within the competence of the Provincial Legislature. A Pro- vincial Legislature may give local cor- porations authority to borrow money at any rate of interest already legal- ized as to other persons having the right to borrow.— <i>Royal Canadian In-</i> <i>surance Co. v. Montreal Warehousing</i> <i>Co.</i> —Superior Ct., Quebec . . . . . ii. 361
ii. 12	INTOXICATING LIQUORS.—An Act of the Parliament of Canada pro- hibited the traffic in intoxicating liquors, except under certain restric- tions, in any county or city the inhabitants of which chose to take the steps therein prescribed for the adoption of its provisions: <i>Held</i> , by the Privy Council, that such an Act was within the jurisdiction of the Dominion Parliament.— <i>Russell v. The</i> <i>Queen</i> .—P. C. . . . . ii. 12
ii. 280	—2. The state of things existing in the confederated Provinces at the time of Confederation, and more par- ticularly that which was recognized by law in all or most of the Provinces, is a useful guide in the interpretation of the meaning attached by the Im- perial Parliament to indefinite ex- pressions employed in the B. N. A. Act. At the time of Confederation, the right to prohibit the sale of in- toxicating liquors was possessed by the municipal authorities under the laws in force respecting municipal institutions in the then Province of Canada and in Nova Scotia, and consequently is to be deemed included in the provision as to "municipal in- stitutions" contained in sect. 92, sub- sect. 5, of the B. N. A. Act. The Pro- vincial Legislatures have the power for the purposes of municipal in- stitutions to pass a prohibitory liquor law, or a liquor law which is prohibi- tory except under certain conditions; this power is not incompatible with the right of the Dominion Parliament to pass a prohibitory liquor law for the whole Dominion.— <i>Corporation</i> <i>of Three Rivers v. Sault</i> .—Q. B., Quebec . . . . . ii. 280

— 3. The Provincial Legislatures may make reasonable regulations for the preservation of good order in the municipalities under their control, and may, for this purpose, restrict the sale of spirituous liquors. The provision of the Quebec Statute, 38 Vict. c. 74, s. 4, ordering houses in which spirituous liquors are sold, to be closed on Sundays, and on every day from eleven of the clock at night, until five of the clock in the morning, is within the competence of a Provincial Legislature.—*Blouin v. Corporation of Quebec*—Superior Ct., Quebec . . . . . ii. 368

— 4. Provincial Legislatures can make laws regulating the sale of liquors in taverns and public places, in order the better to maintain peace and good order, but they cannot directly or indirectly prohibit the manufacture or sale of spirituous liquors, or other articles of commerce, or confer authority for that purpose on municipal councils.—*De St. Aubin v. Lafrance*.—Circuit Ct., Quebec, ii. 392

— 5. A Statute of Nova Scotia, passed after Confederation, imposed penalties for retailing intoxicating liquors without a license, and provided that licenses should only be granted upon the recommendation of the grand jury, concurred in by two-thirds of the members present, and accompanied by a petition for the license from two-thirds of the ratepayers of the polling district in which the tavern was to be established. Enactments not essentially different were in force in the Province before Confederation: *Held*, that the Act in question was not *ultra vires* of the Legislature. *Held*, further, that if the restrictions were *ultra vires*, the proper course was to apply for a mandamus to compel the granting of a license, and that a refusal to grant licenses did not justify selling without a license or release from the statutory penalty thereby incurred. A Provincial Legislature is entitled to legislate with a view to regulate within the Province the sale of whatever may injuriously affect the lives, health, morals or well-being of the community, whether it be intoxicating liquors, poisons, or unwholesome provisions, if such legislation is made *bona fide* with the object of regulation alone, even though to a certain extent trade and commerce are affected thereby. *Keefe v. McLennan*—Supreme Ct., N.S. . . . . ii. 400

— 6. A New Brunswick statute, 36 Vict. c. 10, empowered the General Sessions of the Peace to grant licenses as in their discretion they should think proper, and they having refused to grant a license to any person whatever, a mandamus was granted for the purpose of compelling them to issue a license to the applicant. The Legislature of New Brunswick by an Act subsequent to Confederation declared that "no license for the sale of spirituous liquors shall be granted or issued within any parish or muni-

cipality in the Province when a majority of the ratepayers, residents in such parish or municipality, shall petition the Sessions or municipal council against issuing any license within such parish or municipality." Prior to Confederation, there had been no legislation of this character in New Brunswick, and this enactment was held by the Supreme Court of that Province to be beyond the competence of the Legislature.—*Prigina v. Justices of Kings*—Supreme Ct., N. B. . . . . ii. 499

— 7. The Provincial Legislatures have authority to prohibit or regulate the sale of liquors in saloons or taverns on Sundays, or at special times. The Statute 42-43 Vict. c. 4 (Quebec) which requires houses in which spirituous liquors, etc., are sold, to be closed during the whole of Sunday, and on every other day between 11 p.m. and 5 a.m. is valid. (Ritchie, C.J., and Strong and Fournier, J.J.)—*Poulin v. Corporation of Quebec*—Supreme Ct., Can. . . . . iii. 230

Criminal offence, . . . . . ii. 606, 616  
See TEMPERANCE ACT OF 1864, 3.

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JUDGES.—[*Jurisdiction respecting*].—By an Act of the Legislature of New Brunswick since Confederation, 39 Vict. c. 5, it was provided that Courts should be established for the trial of civil causes before Commissioners appointed by the Lieutenant-Governor in Council. The jurisdiction of the Commissioners was limited to \$40 in actions of debt, and \$16 in actions of tort; and was further restricted in special cases. On an application to set aside a judgment obtained before a Commissioner appointed as above provided, on the ground that since the passing of the B. N. A. Act, a Lieutenant-Governor had no power to appoint Judges of any kind, the New Brunswick Act was held to be valid. Allen, C. J., and Duff, J., dissenting.—*Ganong v. Bayley*—Supreme Ct., N. B. . . . . ii. 509

— 2. In the Province of Ontario there were in existence at the Union, in addition to the Superior and County Courts, other Courts styled Division Courts, for the trial of small causes; of these Division Courts there were several in every county; and they had since their establishment been always presided over by the County Court Judges. An Ontario Statute, passed after the Union, provided in effect that two or more Counties might be grouped together by the Lieutenant-Governor for judicial purposes therein specified, and the Act conferred on the County Court Judges of grouped Counties, the same authority to try suits in each of the grouped Counties, as they possessed in their own Counties respectively: *Held*, that the Provincial Legislature had complete jurisdiction over the Division Courts, and could appoint the officers to preside



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over them, and that the enactment  
in question, as regarded these Courts,  
was valid. *Armour, J.*, dissenting.  
*Wilson v. McGuire*—Q. B. D., Ont. ii. 665

—3. An Act of the Ontario Legis-  
lature provided that the County  
Judge of one County might preside  
at the Sessions in a County other  
than that of which he was Judge:  
*Held*, by *Armour and O'Connor, J.J.*,  
(*Wilson, C.J.*, doubting), that this  
enactment was not within the com-  
petence of the Legislature.—*Gibson  
v. McDonald*—Q. B. D., Ont. iii. 319

—Commission of enquiry . . . i. 789  
*See* COUNTY COURT JUDGE.

JURORS—Selection of . . . ii. 644, 653, n.  
*See* CRIMINAL LAW, 9, 10.

JUSTICES OF THE PEACE.—An  
Act of the old Province of Canada  
authorized the Governor to appoint  
Police Magistrates; the Act was  
temporary: *Held*, that an Act of  
the Ontario Legislature, continuing  
the same in force, was valid.—*The  
Queen v. Reno and Anderson*—Q. B.,  
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—2. Under the B. N. A. Act, the  
right to appoint Magistrates, such as  
District Magistrates, in the Province  
of Quebec, is vested in the Provincial  
Executives; and this right is not  
affected by the provisions contained  
in sections 90 and 130 of that Act.—  
*Regina v. Horner*—Q. B., Quebec ii. 317

—3. The right of the Provincial Leg-  
islatures to legislate in relation to the  
Administration of Justice, includes a  
right to make provision for the  
appointment of Police Magistrates  
and Justices of the Peace by the Lieut-  
enant-Governor.—*Regina v. Bennett*  
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LEGISLATIVE POWER.—The B.  
N. A. Act in assigning either to the  
Dominion or Provincial Legislatures,  
power to legislate on any particular  
subject, gives at the same time all  
the incidental subjects of legislation  
necessary to the exercise of the power  
so assigned. *Bennett v. Pharmaceutical  
Association of Quebec*—Q. B.,  
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LEGISLATURES OF ONTARIO  
AND QUEBEC.—The powers con-  
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129, upon the Provincial Legislatures  
of Ontario and Quebec, to repeal and  
alter the statutes of the old Parlia-  
ment of Canada, are precisely co-  
extensive with the powers of direct  
legislation with which those bodies  
are invested by the other clauses of  
the Act of 1867. The Act 22 Vict.  
c. 66, of the Province of Canada,  
which created a corporation having  
its corporate existence and rights in  
the Provinces of Ontario and Quebec,  
afterwards created by the B. N. A.  
Act, could not, after the B. N. A.  
Act, be repealed or modified by the  
Legislature of either of these Provin-  
ces, or by the conjoint operation of  
both Provincial Legislatures, but  
only by the Parliament of the Domi-  
nion. The Quebec Act, 38 Vict. c.  
64, which assumed to repeal and

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amend the said 22 Vict. c. 66, and (1)  
to destroy a corporation which had  
been created by the Parliament of the  
Province of Canada before the B. N.  
A. Act, and to substitute a new cor-  
poration; (2) to alter materially the  
class of persons interested in the  
corporate funds, and not merely to  
impose conditions upon the trans-  
action of business by the corporation  
within the Province, was held in-  
valid. *Citizens Insurance Company  
of Canada v. Parsons* (7 App. Cas.  
96), approved and distinguished.  
*Dobie v. The Temporaries Board*.  
P.C. . . . . i. 351

*See* PROVINCIAL LEGISLATURES.

LICENSES—Power to make laws  
respecting—The right conferred on  
Provincial Legislatures by sub-s. 9  
of s. 92, of the B. N. A. Act, to deal  
with "shop, saloon, tavern, auctioneer,  
and other licenses," does not extend  
to licenses on brewers, *Regina v.  
Taylor* (36 U. C. Q. B. 218), over-  
ruled. *Ritchie and Strong, J.J.*, dis-  
senting.—*See* *Regina v. The Queen*.  
Supreme Ct., Can. . . . . i. 414

—2. The Legislature of Ontario  
having passed an Act to regulate  
tavern and shop licenses: *Held*, that  
they had power to enact that any  
person who, having violated any of  
the provisions of the Act, should  
compromise the offence, and any per-  
son who should be a party to such  
compromise should, on conviction, be  
imprisoned in the common gaol for  
three months; and that such enact-  
ment was not opposed to sect. 91,  
sub-s. 27, of the B. N. A. Act, by  
which criminal law is assigned  
exclusively to the Dominion Parlia-  
ment.—*Regina v. Boardman*—Q. B.,  
Ont. . . . . i. 676

—3. The B. N. A. Act in con-  
ferring legislative jurisdiction over  
particular subjects, must be held to  
have given at the same time the  
powers needed for the effective exer-  
cise of the jurisdiction granted;  
consequently, the right conferred on  
Provincial Legislatures to make laws  
in relation to shop, saloon, tavern,  
auctioneer and other licenses includes  
the right of imposing penalties for  
violating the provincial laws in rela-  
tion to those subjects. Provincial  
enactments by which persons who  
sell liquor by wholesale are required  
to take out a license are not invalid  
as an interference with trade and  
commerce.—*See* *par. Lercille*—Su-  
perior Ct., Quebec . . . . . ii. 349

—4. Provincial Legislatures can  
impose fines and penalties for selling  
liquor without license.—*Regina v.  
McMillan*—Supreme Ct., N. B. . ii. 489

—5. Per *Spragge, C.J.*: The juris-  
diction of a Provincial Legislature  
to legislate respecting licenses is not  
confined to the object of raising a  
revenue.—*Regina v. Frawley*—C. A.,  
Ont. . . . . ii. 576

—Butchers . . . . . ii. 335, 340  
*See* TRADE AND COMMERCE, 2.

— Insurance.	PAGE. i. 205
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— Limitation of Number.	i. 688
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— Stamp Duty.	i. 117
See TAXATION, 2.	
LIEUTENANT GOVERNOR OF ONTARIO.—Issue of Commissions to hold Courts of Assize.	i. 722
See PREROGATIVE, 1.	
LIQUOR.—Prohibition and regulation of sale.	
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LOCAL AND PRIVATE MATTERS.—Insolvency.	i. 63
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See TAXATION, 1.	
LOCAL WORKS AND UNDERTAKINGS.—By an Act of the Province of New Brunswick, passed prior to Confederation, the plaintiff company was incorporated for the purpose of constructing a railway from the City of St. John, in that Province, westward to the boundary of the United States. After Confederation another Act (32 Vict. c. 54) was passed for the purpose of removing doubts respecting the liability of subscribers for shares in the company, and this latter Act was held to be within the competence of the Provincial Legislature. The fact of the legislature of a foreign country authorizing the construction of a line of railway in that country for the purpose of connecting with a Provincial railway, does not in any way affect the authority of the Legislature of the Province to legislate with respect to the railway within the bounds of the Province.— <i>European and North American Railway Co. v. Thomas</i> —Supreme Ct., N. B.	ii. 439
— 2. All works which are wholly within one Province, whether the undertaking to which they belong be for a commercial purpose or otherwise, are within the control, and subject to the legislation of the Province in which they are situate, unless they are by the Parliament of Canada declared to be for the general advantage of Canada, or for the advantage of two or more of the Provinces. The Dominion Parliament cannot without such declaration, authorize a company to establish in two or more Provinces, works, needing special legislative authority, and which are in their nature local in each Province, the jurisdiction in such case to give the needed authority, being determined by the location and object of the works, and not by the circumstance that the company is authorized to make them in several Provinces. A company was incorporated by Act of the Dominion Parliament for the purpose of establishing telephone lines in the several Provinces of the Dominion, but not of connecting two or more Provinces by telephone lines, nor was the undertaking declared to be for the general advantage of Can-	

ada, or of two or more of the Provinces, and in the absence of these conditions it was held that the Act, so far as it professed to confer a right to erect poles in the streets of cities and towns, was invalid.— <i>Regina v. Mohr</i> ,—Q. B., Quebec.	ii. 257
MAGISTRATES.—Appointment of.	
See JUSTICES OF THE PEACE.	
MARITIME COURT.—The Act 40 Vict. c. 21, D., establishing a Maritime Court, with jurisdiction limited to the Province of Ontario, is within the powers of the Dominion Parliament.— <i>The Picton</i> ,—Supreme Ct., Can.	i. 557
MARKETS.—Power to regulate.	i. 756
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MATTERS OF A MERELY LOCAL OR PRIVATE NATURE.—Direct taxation for local purpose.	i. 95
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— Property in Provinces.	ii. 241
See PROPERTY AND CIVIL RIGHTS, 1.	
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— Restricting sale of Liquor.	i. 688
See MUNICIPAL INSTITUTIONS, 1.	
MEDICAL PRACTITIONER.— <i>Registration</i> .—The Imperial Parliament having enacted since Confederation, that any person registered as a medical practitioner under the English Medical Act (21 and 22 Vict. c. 90), shall be entitled to be registered in any colony upon payment of the fees required for such registration and that the term "colony" shall include any of Her Majesty's possessions which have a legislative authority, the enactment was held to apply to Canada and to override Provincial regulations for the examination of applicants for registration, notwithstanding the Confederation Act and the exclusive power given thereby to the Provinces to legislate in relation to education.— <i>Regina v. College of Physicians and Surgeons, Ontario</i> ,—Q. B., Ont.	i. 761
MILITARY AND NAVAL SERVICE.—The Parliament of Canada has, under the B. N. A. Act, exclusive jurisdiction in matters relating to militia, military and naval service, and defence, and consequently, the provisions of the Imperial Army Act, 1881, do not apply to Canada, so as to make persons not connected with the active militia of the Dominion liable in respect of acts which are offences under the Imperial Act, but not under the Militia Act of Canada.— <i>Holmes v. Temple</i> ,—Sessions of the Peace, Quebec.	ii. 396
MUNICIPAL INSTITUTIONS.—Under the exclusive legislative authority given to it with regard to "Municipal Institutions" and to "matters of a merely local or private nature in the Province," a Provincial Legislature can confer on municipal corporations power to pass by-laws wholly prohibiting the sale of spirituous liquors in shops and	

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 id.—*Regina v.*  
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 places other than houses of public  
 entertainment, and limiting the num-  
 ber of tavern licenses; and the con-  
 ferring such power is not an inter-  
 ference with "the regulation of trade  
 and commerce," assigned exclusively  
 to the Dominion Parliament.—*Slavin*  
*v. Village of Orillia,—Q. B., Ont.* i. 688

2. The provision contained in  
 the Municipal Act of Ontario, au-  
 thorizing city councils to pass by-  
 laws "for preventing criers and ven-  
 dors of small ware from practising  
 their calling in the market, public  
 streets, and vacant lots adjacent  
 thereto," is not *ultra vires* of the  
 Ontario Legislature, as being a regu-  
 lation of trade and commerce. In  
 giving jurisdiction to the Provincial  
 Legislatures in all matters relating to  
 municipal institutions, the intention  
 must have been that these Legis-  
 latures should have power to alter  
 and amend all the existing laws with  
 respect to such institutions, and  
 especially to enlarge the scope of a  
 power existing in the Municipal Ac-  
 at the time of Confederation.—  
*Harris v. City of Hamilton,—Q. B.,*  
*Ont.* i. 756

—Nuisances . . . . . iii. 357  
*See* NUISANCES.  
 —Sale of Liquor.  
*See* INTOXICATING LIQUORS.

#### NAVIGATION AND SHIPPING.—

The power to incorporate a navi-  
 gation company the operations  
 of which are limited to a particular  
 Province, belongs exclusively to the  
 Legislature of such Province.—*Mac-*  
*donnell v. The Union Navigation Co.,*  
*Q. B., Quebec.* ii. 228

2. The Government of the Pro-  
 vince of Quebec having by Letters Pa-  
 tent granted a waterlot extending into  
 deep water, at the mouth of the River  
 St. Maurice, the Letters Patent were  
 held to be valid, subject to an implied  
 restriction that the requirements of  
 navigation and commerce were not to  
 be interfered with or injured there-  
 by.—*Normand v. The St. Lawrence*  
*Navigation Co.—Q. B., Quebec.* ii. 231

3. The Dominion Parliament can  
 confer on the Vice-Admiralty Courts  
 jurisdiction in any matter of navi-  
 gation and shipping within the territorial  
 limits of the Dominion. When an  
 Act of the Parliament of Canada is  
 in part repugnant to an Imperial  
 Statute, effect will be given to the  
 former so far as its provisions do not  
 conflict with those of the Imperial  
 enactment.—*The Farewell — Vice-*  
*Admiralty Ct., Quebec.* ii. 378

4. A Provincial enactment auth-  
 orizing the erection of booms in a  
 navigable river does not conflict with  
 the power of the Parliament of  
 Canada with respect to navigation  
 and shipping under sect. 91 of the  
 B. N. A. Act the words navigation  
 and shipping being employed in that  
 section in the sense in which they  
 are used in the several Acts of the  
 Imperial Parliament relating to navi-  
 gation and shipping, and in the Act

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 of the Parliament of Canada, 31  
 Vict. c. 58, viz.: As giving the right  
 to prescribe rules and regulations for  
 vessels navigating the waters of the  
 Dominion, and not as excluding for  
 all purposes Provincial jurisdiction  
 over navigable waters. *McMillan v.*  
*Southwest Boom Co.—Supreme Ct.,*  
*N. B.* ii. 542

5. A Provincial Legislature may  
 incorporate a boom company, but  
 cannot confer upon the company  
 power to obstruct the navigation of  
 a tidal and navigable river, *Tasch-*  
*ereau, J., doubting, McMillan v.*  
*Southwest Boom Co., (1 P. & B. 715),*  
*overruled in part, Quaddy River*  
*Driving Boom Co. v. Davidson*  
*Supreme Ct., Can.* iii. 243

#### NEW BRUNSWICK—Statutes.

*See* STATUTES.

#### NOVA SCOTIA—Statutes.

*See* STATUTES.

NUISANCES — The power of the  
 Parliament of Canada to enact a  
 general law of nuisances, as incident  
 to its right to legislate as to criminal  
 law, is not incompatible with a right  
 in the Provincial Legislatures to  
 authorize municipal corporations to  
 pass by-laws against nuisances hurt-  
 ful to public health, as incident to  
 municipal institutions.—*Ex parte*  
*Pillow—Superior Ct., Quebec.* iii. 357

—Information respecting, i. 813, ii. 559  
*See* ATTORNEY-GENERAL.

ONTARIO—Power to repeal or modify  
 laws of Province of Canada. . . . i. 351

#### LEGISLATURES OF ONTARIO AND QUEBEC.

—Statutes.

*See* STATUTES.

PATENT OF INVENTION.—Pro-  
 ceedings in the nature of *aisire facias*,  
 to set aside Letters Patent of invention  
 issued under the Dominion Statute,  
 35 Vict. c. 26, cannot be instituted  
 in the name of a Provincial Attorney-  
 General, and can only be legally  
 brought by the Attorney-General of  
 Canada. *Moussau v. Bate—Court*  
*of Review, Quebec.* . . . . iii. 341

PENALTIES —Procedure. . . . ii. 291, 297,  
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*See* CRIMINAL LAW, 3-6, 11.

—Recovery by informer, . . . . iii. 297  
*See* PROPERTY AND CIVIL RIGHTS, 3.

POLICE MAGISTRATES —Power  
 to appoint, . . . . . i. 810  
*See* JUSTICES OF THE PEACE, 1.

#### PREROGATIVE OF THE CROWN

The provisions of the B. N. A.  
 Act have not superseded the pre-  
 rogative right of the Crown to issue  
 a commission to the Judge of the  
 Provisional Judicial District of Al-  
 goma to hold a Court of Oyer and  
 Terminer and General Gaol Delivery,  
 for trial of felonies, etc.; and such a  
 commission by the Deputy of the  
 Governor-General was held to be  
 legal. *Per Wilson, J.—The Lieuten-*  
*ant-Governor, as well as the Govern-*

General, has the power to issue commissions to hold Courts of Assize. *Régina v. Amer*—Q. B., Ont. . . i. 722

— 2. The petitioner having been declared duly elected a member to represent the Electoral District of Montmanier in the Legislative Assembly of the Province of Quebec, his election was afterwards, on petition, declared null and void by judgment of the Superior Court, under the Quebec Controverted Elections Act, 1875, and himself declared guilty of corrupt practices, both personally and by his agents. He now applied for special leave to appeal to Her Majesty in Council: *Held*, that such application must be refused. Although the prerogative of the Crown cannot in general be taken away except by express words, and the 90th section of the above Act providing that "such judgment shall not be susceptible of appeal," does not mention either the Crown or its prerogative; yet the fair construction of the Act was held to be that it was the intention of the Legislature to create a tribunal for the purpose of trying election petitions in a manner which should make its decision final for all purposes, and should not annex to it the incident of its judgment being reviewed by the Crown under its prerogative; and the Act having been assented to on the part of the Crown, and the Crown being therefore a party to it, there was held to be no prerogative right to admit an appeal contrary to the intention of the Act.—*Thérage v. Landry*—P. C. . . . . ii. 1

— Appeal . . . . . i. 255  
*See* BANKRUPTCY AND INSOLVENCY, 2.

PRINCE EDWARD ISLAND.—  
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— Criminal . ii. 291, 308, 311, 602, 653  
*See* CRIMINAL LAW, 3, 5, 6, 8, 10.

PROHIBITORY LIQUOR LAW.—  
 Power to enact or repeal. . . ii. 12  
 280, 392, 382, 385; iii. 348  
*See* INTOXICATING LIQUORS, 1, 2, 4.  
 TEMPERANCE ACT OF 1864, 2, 5.

PROPERTY AND CIVIL RIGHTS.  
 —An Act of the Legislature of Quebec authorizing the Lieutenant-Governor to revoke the right of certain Municipalities to exact tolls on a toll-bridge, for default in making repairs, and to transfer the property to others, was held valid, as the matter related to property and civil rights and was of a merely local nature.—*Municipality of Cleveland v. Municipality of Melbourne and Brompton Gore*.—Q. B., Quebec ii. 241

— 2. *Quære*, whether the Dominion Act, 32-33 Vict. c. 29, s. 134, relating to costs in actions against Justices, is not *ultra vires* of the

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Federal Parliament as relating to procedure in a civil matter.—*Whit-  
 tier v. Diblee*.—Supreme Ct., N.B. ii. 492

— 3. The jurisdiction of the Provincial Legislatures over "property and civil rights" does not preclude the Parliament of Canada from giving to an informer the right to recover, by a civil action, a penalty imposed as a punishment for bribery at an election. The Dominion Elections Act, 1874, by section 109, provides that all penalties and forfeitures (other than fines in cases of misdemeanour) imposed by the Act shall be recoverable, with full costs of suit, by any person who will sue for the same, by action of debt or information, in any of Her Majesty's Courts in the Province in which the cause of action arose, having competent jurisdiction: *Held*, that this enactment was valid.—*Doyle v. Bell*.—C. A., Ont. . . . . iii. 297

— Bankruptcy and Insolvency.  
*See* BANKRUPTCY AND INSOLVENCY.

— Exclusive Rights of Fishing. ii. 65  
*See* FISHERIES.

— Regulation of Trade and Commerce . . . . . i. 265  
*See* TRADE AND COMMERCE, 1.

PROVINCIAL COURTS.—*Power to impose duties on.* The Parliament of the Dominion of Canada has power to impose new duties upon existing Provincial Courts, and to give them powers as to matters coming within the classes of subjects over which the Dominion Parliament has jurisdiction, consequently the Dominion Controverted Elections Act of 1874 (Canadian Stat. 37 Vict. c. 10), which confers upon the Provincial Courts jurisdiction with respect to elections to the Dominion House of Commons, is valid. Special leave refused to appeal from two concurrent judgments of the Courts in Canada, affirming the competency and validity of the said Act of 1874; it appearing to the Judicial Committee of the Privy Council that there was no substantial question requiring to be determined, none of their Lordships having any doubt of the soundness of the judgments, though several judges of the first instance had held the Act to be invalid.—*Valin v. Langlois*.—P. C. . . . . i. 158

— Precedence in . . . . . i. 488  
*See* QUEEN'S COUNSEL.

PROVINCIAL LEGISLATURES.—  
 By the Statutes of the Quebec Legislature, 31 Vict. c. 32, and 32 Vict. c. 29, Fire Commissioners or Marshals were appointed, with power to investigate the origin of any fires occurring in the cities of Quebec and Montreal; to compel the attendance of witnesses, and examine them on oath; and to commit to prison any witnesses refusing to answer without just cause: *Held*, that these Statutes were within the competency of the Provincial Legislature. On petition by the Attorney-General of the Province of Quebec, special leave was

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granted to appeal from a judgment of  
the Queen's Bench, Quebec, on a case  
reserved in a trial for felony.—*The*  
*Queen v. Coote*.—P. C. . . . . i. 57

2. A Provincial Legislature of  
Canada has no power to pass an Act  
transferring to a new company, or  
otherwise, a federal railway, with its  
appurtenances, property, rights and  
powers, or to dissolve a federal com-  
pany, or to substitute for it a com-  
pany to be governed by, and subject  
to, Provincial legislation.—*Bourgois*  
v. *La Compagnie du Chemin de Fer de*  
*Montreal, Ottawa, et Occidental*.—  
P. C. . . . . i. 238

3. The first step to be taken with  
a view to test the validity of an Act  
of a Provincial Legislature under the  
B.N.A. Act is to consider whether  
the subject-matter of the Act falls  
within any of the classes of subjects  
enumerated in section 92, which  
states the legislative powers of the  
Provincial Legislatures. If it does  
not come within any of such classes,  
the Provincial Act is of no validity.  
If it does, these further questions  
may arise, viz., whether the subject  
of the Act does not also fall within  
one of the enumerated classes of  
subjects in section 91, which states  
the legislative powers of the Do-  
minion Parliament, and whether the  
power of the Provincial Legislature  
is or is not thereby overborne.—  
*Dobie v. The Temporalities Board*.—  
P. C. . . . . i. 351

4. A testator had devised the  
residue of his estate in trust for such  
of his children as should be living at  
the decease of his widow, and for the  
children of any of them who should  
then be dead. Before the widow's  
death, and on her application and  
that of the testator's children (all of  
whom were living), the Provincial  
Legislature of Ontario passed an  
Act (34 Vict. c. 99) for divid-  
ing the property among the testator's  
children forthwith: *Held*, that such  
an Act was within the competence of  
the Provincial Legislature; but the  
Court held further (Draper, C.J., and  
Spragge, C., dissenting) that the  
testator's grand-children, not having  
been expressly named in the Act, and  
there being no express and explicit  
enactment specifically referring to  
and barring their rights, their interests  
remained unaffected by the Act.  
—*Re Gonthier*.—C. A., Ont. . . . . i. 560

5. Provincial Legislatures are  
not restricted to legislation respecting  
property such as bonds held in the  
Province, and where debts and other  
obligations are authorized to be con-  
tracted under a local Act, passed in  
relation to a matter within the power  
of a Local Legislature, such debts  
may be dealt with by subsequent  
Acts of the same Legislature, not-  
withstanding that by a fiction of law  
they may be domiciled out of the  
Province.—*Jones v. Canada Central*  
*Railway Co.*—Q. B., Ont. . . . . i. 777

6. Provincial Legislatures have,  
as incident to their express powers

under the B.N.A. Act, the right to  
summon witnesses, and to punish  
persons who disobey such summons,  
this right being necessary to the  
proper exercise of their powers of  
legislation, and the control assigned  
to them in respect of the administra-  
tion of public affairs. The provisions  
of the Act of the Quebec Legislature,  
35 Vict., c. 5, regulating this right  
are valid. Ramsay, J., dissenting.—  
*Ex parte Dansereau*.—Q. B., Que-  
bec . . . . . ii. 165

7. A Provincial Legislature has  
authority to determine the age or  
other qualifications which shall  
be required on the part of persons  
resident in the Province, to entitle  
them to manage their own affairs, or  
to exercise certain professions or  
branches of business attended with  
danger or risk to the public. If laws  
on these subjects incidentally affect  
trade and commerce, this incidental  
power must be deemed to be included  
in the right to deal with those matters  
which are specially placed under Pro-  
vincial control. The Quebec Phar-  
macy Act of 1875, so far as it requires  
certain qualifications on the part of  
persons exercising the business of  
selling drugs and medicines, is valid.  
The Provincial Legislatures have the  
right to appropriate fines to municipal  
or other corporations. *Bennett v.*  
*Pharmaceutical Association of Que-*  
*bec*—Q. B., Quebec. . . . . ii. 250

8. A Provincial Legislature is  
entitled to legislate with a view to  
regulate within the Province the sale  
of whatever may injuriously affect the  
lives, health, morals or well-being of  
the community, whether it be intox-  
icating liquors, poisons, or unwhole-  
some provisions, if such legislation is  
made *bona fide* with the object of  
regulation alone, even though to a  
certain extent trade and commerce  
are affected thereby.—*Kerfe v. Mc-*  
*Lennan*.—Supreme Ct., N. S. . . . . ii. 400

PUBLIC INJURY.—Proper officer to  
complain of.  
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QUEEN'S COUNSEL.—*Appointment*  
*of*.] A Provincial Legislature has no  
power to authorize the Lieutenant-  
Governor to appoint Queen's Counsel,  
or to grant to any member of the  
Bar a patent of precedence in the  
Courts of the Province. (Henry,

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Taschereau and Gwynne, J.J.) The question arose on an appeal by Queen's Counsel appointed by the Lieutenant-Governor under Acts of the Provincial Legislature, the respondent being a Queen's Counsel appointed by the Governor-General; and Strong, Fournier and Taschereau, J.J., were of opinion that the Provincial Acts under which the appellants were appointed were not intended to affect the precedence of Queen's Counsel appointed by the Governor-General; and it was therefore held, Per Strong and Fournier, J.J.:— That as this Court ought never, except in cases when such adjudication is indispensable to the decision of a cause, to pronounce upon the constitutional power of a Legislature to pass a statute, there was no necessity in this case for them to express an opinion upon the validity of the Acts in question.— <i>Leclair v. Ritchie</i> .—Supreme Ct., Can. . . . . i. 488	
RAILWAYS.—Where it is necessary for a Provincial railway in Ontario to cross a Dominion railway, the company desiring to effect such crossing must procure the approval of the Commissioner of Public Works for Ontario, as well as the approval of the Railway Committee of the Privy Council of the Dominion; and the railway companies cannot by agreement waive this provision.— <i>Credit Valley Railway Co. v. Great Western Railway Co.</i> —Chy., Ont. . . . . i. 822	
—2. The Province of Ontario passed an Act to make provision for the safety of railway employees and the public, such provision having reference to the construction and maintenance of railway frogs, etc. Per Spragge, C. J., a Provincial Legislature has no power to pass such a law with reference to a Dominion railway situate locally within the Province. The other Judges of the Court of Appeal expressed no opinion upon the point, being of opinion that the Act was not intended to apply to Dominion railways, and for that reason did not apply to the Dominion railway company in question.— <i>Monkhouse v. Grand Trunk Railway</i> .—C. A., Ont. . . . . iii. 289	
—Extending beyond Province. i. 95 See TAXATION, 1.	
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SOVEREIGN.— <i>Representatives of.</i> The members of the Executive Council of a Province, under the B. N. A. Act, represent the Sovereign, and cannot be sued in the civil courts of the Province for acts performed by them in the discharge of their official duty.— <i>Molson v. Chapleau</i> .—Superior Ct., Quebec. . . . . iii. 366	
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# TAVERN AND SHOP LICENSES— Jurisdiction respecting. *See* LICENSES.

## TAVERNS—Regulations respecting iii. 144 *See* DELEGATION, 1.

TAXATION—An Act of the Provincial Legislature of New Brunswick (33 Vict. c. 47), intituled "An Act to authorize the issuing of debentures on the credit of the lower District of the Parish of St. Stephen, in the County of Charlotte," which empowered the majority of the inhabitants of that parish to raise, by local taxation, a subsidy designed to promote the construction of a railway extending beyond the limits of the Province, but already authorized by statute, was held to be within the legislative capacity of the Legislature. A Provincial Legislature can, under the B. N. A. Act, sect. 92, art. 2, impose direct taxation for a local purpose upon a particular locality within the Province. The Act in question was held to relate to a matter of "a merely local or private nature in the Province," which, by the 92nd section of the B. N. A. Act is assigned to the exclusive competency of the Provincial Legislature, and not to relate to a railway or any local work or undertaking within the excepted subjects mentioned in art. 10, subsect. (a) of the said section. *L'Union St. Jacques de Montreal v. Belisle*. L. R. 6 P. C. 31, approved.—*Dow v. Black*, P. C. . . . i. 95

2. The clauses of the Act, 39 Vict. c. 7 (passed by the Legislature of Quebec), which impose a tax upon certain policies of assurance and certain receipts and renewals, are not authorized by the B. N. A. Act, 1867, s. 92, sub-ss. 2, 9. A License Act by which a licensee is compelled neither to take out, nor pay for a license, but which merely provides that the price of a license shall consist of an adhesive stamp, to be paid in respect of each transaction, not by the licensee, but by the person who deals with him, is virtually a Stamp

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ict. c. 107. ii. 542  
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in art. 10, sub-  
tion. *L'Union*  
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Act and not a License Act. The  
imposition of a stamp duty on policies,  
renewals and receipts with provisions  
for avoiding the policy, renewal, or  
receipt in a Court of Law, if the  
stamp is not affixed is not warranted  
by the terms of an Act which author-  
izes the imposition of direct taxation.  
*Attorney-General for Quebec v. The*  
*Queen Insurance Co.*—P. C. . . i. 117

— 3. A Provincial Legislature can-  
not impose a tax upon the official  
income of an officer of the Dominion  
Government or confer such a power  
upon the municipalities.—*Leprohon*  
*v. City of Ottawa*.—C.A., Ont. . . i. 592

— 4. Held that Quebec Act (43 &  
44 Vict. c. 9) which imposed a duty  
of ten cents upon every exhibit filed  
in Court in any action depending  
therein, is *ultra vires* of the Provincial  
Legislature.—*Attorney-General of*  
*Quebec v. Reed*—P. C. . . iii. 190

— 5. The Local Legislature has  
authority to enact a law imposing a  
tax on the Dominion notes held by a  
bank as portion of its cash reserve  
under the Dominion Act relating to  
"Banks and Banking" (34 Vict. c.  
5, s. 14).—*Windsor v. Commercial*  
*Bank of Windsor*. . . iii. 377

— Lands liable to. . . i. 831  
See INDIAN LANDS.

— Proceeds of insolvent estate. ii. 343  
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#### TEMPERANCE ACT OF 1864 —

The B. N. A. Act in assigning to  
the Parliament of Canada the ex-  
clusive legislative authority over  
"the regulation of Trade and Com-  
merce," did not thereby repeal "The  
Temperance Act of 1864," of the late  
Province of Canada, 27-28 Vict. c.  
18, and did not deprive municipal  
corporations of the power thereby  
given to prohibit the sale of intoxi-  
cating liquors.—*Noel v. The Corpora-*  
*tion of the County of Richmond*—  
Q. B., Quebec. . . ii. 246

— 2. A Provincial Legislature can-  
not repeal or modify those sections  
of the Temperance Act of 1864, (27-  
28 Vict. c. 18), which conferred on  
Municipal Councils the power to pass  
by-laws for prohibiting the sale of  
intoxicating liquors.—*Hart v. Cor-*  
*poration of the County of Missisquoi*—  
Circuit Ct., Quebec . . . ii. 382  
*Coocy v. Municipality of Branc*—Cir-  
cuit Ct., Quebec . . . ii. 385

— 3. The Temperance Act of 1864,  
of the late Province of Canada, pro-  
hibited the sale of liquors by retail  
wherever the Act was brought into  
force, and provided special proceed-  
ings and punishments for offences  
against the Act; the Provincial Legis-  
lature of Ontario afterwards enacted  
that the sale of liquor in such localities  
should also be a contravention of the  
Provincial Acts for selling without a  
license: these Acts provided other  
punishments and proceedings: *Held*,

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that under the Temperance Act the  
matter was one of criminal law; and  
that the legislation of the Provincial  
Legislature was *ultra vires*.—*Regina*  
*v. Prittie*—Q. B., Ont. . . ii. 606  
*Regina v. Lake*—Q. B., Ont. . . ii. 616

— 4. Acts of the Ontario Legis-  
lature, provided that local Boards  
of Commissioners, and Inspectors  
appointed by the Lieutenant-Gov-  
ernor, should perform certain duties  
in their respective localities for the  
enforcement of the statute of the  
late Province of Canada, called  
"The Temperance Act of 1864;"  
and that a certain proportion of  
the expenses attending the execu-  
tion of these duties should be paid  
by the municipalities concerned.  
The Temperance Act provided for  
prosecution by private persons,  
as well as others, for offences  
against the Act: *Held*, that the On-  
tario enactments were within the  
competence of the Legislature. An  
enactment of an *ex post facto* char-  
acter by a Provincial Legislature is  
not void on that ground.—*License*  
*Commissioners of Prince Edward v.*  
*County of Prince Edward*—Chy.,  
Ont. . . ii. 678

— 5. A Provincial Legislature can-  
not repeal those sections of the Tem-  
perance Act of 1864, which relate to  
the prohibition of the sale of intoxi-  
cating liquors.—*Griffith v. Rivoult*—  
Superior Ct., Quebec . . . iii. 348

#### TRADE AND COMMERCE.—

The power of the Dominion Parliament  
for the regulation of trade and com-  
merce includes political arrangements  
in regard to trade, and regulations of  
trade in matters of inter-provincial  
concern, and may, perhaps, include  
general regulations affecting the  
whole Dominion, but it does not  
comprehend the power to regulate  
the contracts of a particular business  
or trade (such as the business of fire  
insurance) in a single Province. An  
Act of the Province of Ontario to  
secure uniform conditions in policies  
of fire insurance was held to be within  
the power of a Provincial Legislature  
over "property and civil rights."  
Such an Act, so far as relates to  
insurance on property within the  
Province, may bind all fire insurance  
companies, whether incorporated by  
Dominion, Provincial, Colonial or  
Foreign authority. A Dominion Act  
having required insurance companies  
to obtain licenses from the Minister  
of Finance as a condition of their  
carrying on the business of insurance  
in the Dominion, neither the Act, nor  
the fact of a Company having obtain-  
ed such license, was held to withdraw  
the Company from the operation of  
the Provincial Act.—*Citizens and*  
*Queen Insurance Companies v. Par-*  
*sens*—P. C. . . i. 265

— 2. An Act which authorized the  
Corporation of the City of Montreal  
to impose a license tax on butchers  
keeping stalls or shops in the city for

the sale of meat, fish, etc., elsewhere than on the public markets, was held not to be <i>ultra vires</i> of the Provincial Legislature, as an interference with trade and commerce.— <i>Angers v. The City of Montreal</i> —Superior Ct., Quebec . . . . .	PAGE. ii. 335
<i>Mallette v. The City of Montreal</i> —Superior Ct., Quebec . . . . .	ii. 340
— Bankruptcy . . . . .	ii. 343
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